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Blood Money: When Media Expose Others to Risk of Bodily Harm

Sandra Davidson

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Blood Money: When Media Expose Others to Risk of Bodily Harm

by
SANDRA DAVIDSON*

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- In Rhode Island, a troubled man, whom police are trying to dissuade from committing suicide, receives an unsolicited call from a reporter and shoots himself to death moments after a television station airs his taped goodbyes.

- In Michigan, a young man who appears on *The Jenny Jones Show* to reveal that he had a secret crush on another man is shot to death by the shocked object of his affection.

- In Louisiana, a woman working at a convenience store is shot and left paralyzed from the neck down by a young couple on a crime spree after the couple repeatedly watched Oliver Stone's movie, *Natural Born Killers*.

- In suburban Washington, D.C., two women and a disabled boy are murdered by an assassin who fastidiously followed guidelines in *Hit Man: A Technical Manual for Independent Contractors*.

- In Texas, a federal agent is shot while storming a religious cult's armed fortress—the result, he claims, of the press letting the cult know of the planned raid.

- In Georgia, a man backing his car down his driveway is shot by assassins hired as the result of an ad in *Soldier of Fortune*, a magazine for self-styled mercenaries.

- In Missouri, a woman escapes from an abductor wielding a sawed-off shotgun, then is stalked by the man after a newspaper prints her name and address.

Are the media responsible for the harm? Some might ask, are the media responsible, period?¹

"A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution, and like many other virtues it cannot be legislated."² So spoke the United States

1. William A. Henry comments, "News consumers may . . . wonder if journalism has any rules at all. The honest answer: not really." William A. Henry III, *When Reporters Break the Rules*, TIME, Mar. 15, 1993, at 75. Strictly speaking, Henry is wrong. Journalists do have rules. The problem is that too often those rules are imposed from the outside by courts instead of journalists imposing the rules upon themselves. The examples are many. The rule that journalists shall not damage another's reputation through falsehoods has been imposed upon journalists through libel law. Justice Stewart stated eloquently the justification for libel law: "The right of a man [or woman] to the protection of his [or her] own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty." *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966). In *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991), the Court ruled that journalists who breach their promises of confidentiality could face liability under contract law. See *infra* note 15 for discussion at a "Talk Summit" on media responsibility.

2. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256 (1974).

Supreme Court in 1974. Perhaps press responsibility cannot be legislated, but more and more courts, with the Supreme Court's approval, are making the media pay when the media expose others to the risk of bodily harm. If blood flows, or if an individual is merely put in jeopardy, courts are extracting payment from the media: blood money. Fancy First Amendment theory falls by the way. Talk of the importance of a free press proves wasted breath. In short, media protection crumbles while protection of the individual prevails.

Awarding blood money in such cases has rational and emotional appeal, at least to the public. Surely it seems plausible that, in balancing the rights of freedom of speech and press against the right to life, courts should pronounce that the right to life is more important. Courts are implicitly saying that stilling the press is preferable to stilling a heart.

But, as is often the case, awarding damages is a slippery slope. Perhaps where the media's actions have clearly exposed a particular person (the victim) to the risk of bodily harm or death by another particular person (the assailant), the media should pay. But what if there were no readily identifiable victim or assailant? How nebulous—or how remote—can the risk be and still subject the media to liability?

This article explores the developing area of the law of negligence as applied to media when an evil-doer, unassociated with the media, takes advantage of information revealed by the media to threaten or wreak bodily harm or death. After defining "negligence," this article explores current negligence suits bombarding mass media. The article will examine suits against TV broadcast companies, a movie producer, a book publisher, and a newspaper. The likelihood of success of these suits can only be measured by analyzing prior negligence cases, most notably *Braun v. Soldier of Fortune Magazine, Inc.*³ and *Hyde v. City of Columbia*.⁴ The media lost both of these cases, and the United States Supreme Court declined *certiorari*.

This article next explores the related doctrine of strict liability, concluding that this doctrine has not proved fruitful for plaintiffs suing the media. With the exception of cases involving aeronautical charts, the courts have refused to treat information as a product to which strict liability can apply.

The question of endorsement of a product, as explored further in this article, is a significant issue in cases concerning media liability.

3. 968 F.2d 1110 (11th Cir. 1992), *cert. denied*, 506 U.S. 1071 (1993).

4. 637 S.W.2d 251 (Mo. App. 1982), *cert. denied*, 459 U.S. 1226 (1983).

The absence of an endorsement means no liability, no duty to check for accuracy, and no duty to warn. In short, a type of *caveat emptor* seems to prevail. However, an endorsement can result in media liability.

This article next discusses the doctrine of incitement. But like strict liability, incitement has not proved productive for plaintiffs. A current suit involving “gangsta rap” by Tupac Shakur, however, leaves the window open for a successful suit in this area.⁵

This article concludes with a discussion of the increased danger in the United States from bombings, some arguably triggered by the availability of bomb recipes on the Internet. This article asks whether increasing dangers to physical safety are endangering freedom of expression. The concern is that if the perceived dangers become too “clear and present,” some freedom of speech and press might be sacrificed on the altar of safety. Could “how to” books on mayhem be sacrificed while serious literary works that inspire some demented readers to murder be spared? The answer is muddy.

Nevertheless, this fact is clear: media that ignore a foreseeable risk of physical harm to others risk liability because courts are extracting money from them for the blood spilled. The bottom line is that negligence suits are an increasing risk to the financial health of the media.

I

Current Suits for Negligence

A. Negligence: An Old Tort Theory

Standard negligence law provides the legal backdrop for assessing press liability in bodily injury cases such as that originating in Waco, Texas. The key to liability in negligence cases is “foreseeability.” If an individual engages in conduct that could foreseeably create harm, and if that harm then occurs, the individual may be liable for negligence.

The Supreme Court has dealt with negligence cases virtually since the Court’s inception. In 1786, it heard a maritime case involving “gross negligence (*crafta negligentia*).”⁶ Early Supreme Court tort law discussed liability for negligence if an injury was a *probable* consequence of the *defendant’s* act:

5. See *infra* Part V.F.2 for a full discussion of “gansta rap.”

6. *Purviance v. Angus*, 1 U.S. 180, 182 (1786).

[I]t is generally held that, in order to warrant a finding that negligence . . . is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances.⁷

The Court explained in another early case:

[A] careless person is liable for all the natural and probable consequences of his [or her] misconduct. If the misconduct is of a character which, according to the usual experience of mankind, is calculated to invite or induce the intervention of some subsequent cause, the intervening cause will not excuse him [or her], and the subsequent mischief will be held to be the result of the original misconduct. This is upon the ground that one is held responsible for all the consequences of his act which are natural and probable, and ought to have been foreseen by a reasonably prudent man [or woman].⁸

More recent Supreme Court cases reveal a refinement in negligence theory. No longer must the injury be the result of the defendant's act. The defendant could be held liable for the "intentional or criminal misconduct" of another, so long as that misconduct should have been foreseen: "That the foreseeable danger was from intentional or criminal misconduct is irrelevant; respondent nonetheless had a duty to make reasonable provision against it. Breach of that duty would be negligence"⁹

Where voluntary acts of responsible human beings intervene between defendant's conduct and plaintiff's injury, the problem of foreseeability is the same and courts generally are guided by the same test. If the likelihood of the intervening act was one of the hazards that made defendant's conduct negligent—that is, if it was sufficiently foreseeable to have this effect—then defendant will generally be liable for the consequences So far as scope of duty . . . is concerned, it should make no difference whether the intervening actor is negligent or intentional or criminal.¹⁰

"Foreseeability" has consistently referred to what a "reasonably prudent person" would "reasonably" foresee under similar circumstances.¹¹ Another unchanging element of negligence theory is that "ordinary care" is the standard one must meet in order to avoid

7. *Scheffer v. R.R. Co.*, 105 U.S. 249, 252 (1881)(quoting *Milwaukee & St. Paul Ry. Co. v. Kellogg*, 94 U.S. 469, 475 (1876)).

8. *Atchison, Topeka, & Santa Fe Ry. Co. v. Calhoun*, 213 U.S. 1, 7 (1909).

9. *Lillie v. Thompson*, 332 U.S. 459, 462 (1947)(footnote omitted).

10. *Sheridan v. United States*, 487 U.S. 392, 405-06 (quoting 2 F. HARPER & F. JAMES, *LAW OF TORTS* § 20.5 (1956)(footnotes omitted in original)).

11. *Gallick v. Baltimore & Ohio R.R. Co.*, 372 U.S. 108, 118 (1963).

liability: “[I]t is said that negligence is the failure to observe ordinary care, and ordinary care is that degree of care which people of ordinary prudence and sagacity use under the same or similar circumstances. What would ordinarily prudent persons have done under like circumstances?”¹²

The two immutable concepts in negligence theory—(1) that negligence law involves what a “reasonably prudent person” would foresee and (2) that it holds persons to a standard of “ordinary care”—are woven together in this passage:

It is always a question of what reasonably prudent persons under like or similar circumstances would or should have anticipated in the exercise of ordinary care. Where there is no danger reasonably to be anticipated or apprehended, there is no duty to guard against something that in the minds of reasonable men [or women] does not exist. However, if such expectation carries a realization that a given set of circumstances is suggestive of danger, then failure to take appropriate safety measures constitutes negligence.¹³

In short, the law of negligence operates on the theory that we are, at least to some extent, each others’ keepers. While we do not have to be extraordinary in what we foresee or in the care we take, we must rise to the level of common or ordinary circumspection. Requiring at least this standard presumably works to the advantage of society as a whole.

B. Surviving Family Members and an Injured Federal Agent Take Aim at the Media

Questions about media responsibility seem to be arising with increasing frequency. In 1996, at least a half-dozen cases were winding their slow courses through the legal system, seeking damages from producers of a TV talk show, a TV news station, makers of a movie, a book publisher, a newspaper, a TV-news crew, and a record company. The record company case, resulting from the shooting death of a Texas trooper by a teenager listening to Tupac Shakur’s “gangsta rap,” will be covered later in the “incitement” discussion.¹⁴ Regardless of whether any of the cases provide relief for the plaintiffs, one point is clear: the risk of media having to stand trial for negligence or related charges is certainly increasing.

12. *Id.* at n.6 (quoting instructions to the jury).

13. *Inman v. Baltimore & Ohio R.R. Co.*, 361 U.S. 138, 146 n.2 (1959)(quoting jury instructions).

14. On incitement, see *infra* Part V and accompanying text.

1. Television

a. Talk Show

In March 1995, Jonathan Schmitz, a 24-year-old from Michigan, appeared as a guest on *The Jenny Jones Show* to meet a person who had a secret crush on him. Schmitz assumed the secret admirer would be a woman. Instead, it was Scott Amedure, a 32-year-old gay man. Three days later, Schmitz bought a 12-gauge shotgun and killed Amedure. Then he called the police.¹⁵ The show's producers did not broadcast the tape of the encounter between Schmitz and Amedure.¹⁶

On November 12, a jury convicted Schmitz of second-degree murder,¹⁷ finding he acted without premeditation.¹⁸ On December 4, the trial judge sentenced Schmitz to a prison term of 25 to 50 years instead of for life as the prosecutor had asked; the judge said he took into consideration Schmitz's thyroid condition, alcoholism, and history

15. Ann Leslie, *In the TV Ratings War, Weirdos Are Winners*, DAILY MAIL, Oct. 31, 1995, at 20; Alexandra Marks, *Talk Television Goes on Trial*, CHRISTIAN SCI. MONITOR, Oct. 11, 1995, at 12. See also Dick Feagler, *Some TV Talk Shows Can Be Deadly Serious*, PLAIN DEALER (Cleveland), Mar. 15, 1995, at 2A.

Media responsibility became a hot topic during the last weekend of October 1995, when Population Communications International sponsored a "Talk Summit" at Manhattan's Millennium Hotel. TV talk-show producers heard an earful, including criticism by Health and Human Services Secretary Donna Shalala. See Verne Gay, *Off Camera: TV Talk Is Cheap: After the Summit, Responsible Talk Shows? Nonsense*, NEWSDAY, Oct. 31, 1995, at B2; Verne Gay, *Off Camera: Searching in the Trash: A 'Summit' of the Talk Shows*, NEWSDAY, Oct. 26, 1995, at B3.

Former Education Secretary William Bennett and two senators, Joseph I. Lieberman and Sam Nunn, showed clips of, and urged Americans to boycott, daytime talk shows. Lieberman called it "the revolt of the revolted." See Cheryl Wetzstein & Joyce Price, *Bennett Declares War on Daytime Talk Shows: Two Senators Join in Bid to Restore 'Decency'*, WASH. TIMES, Oct. 27, 1995, at A4. The Talk Summit, some commentators say, resulted because of the murder of Amedure following the taping of *The Jenny Jones Show*. See David Hiltbrand, *Picks & Pans*, PEOPLE, Nov. 13, 1995, at 15.

16. *The 'Jenny Jones' Trial Delayed*, UPI, Oct. 23, 1995, available in LEXIS, News Library, UPI File. A Michigan court of appeals struck down the circuit court judge's "overly broad" gag order against the media in Schmitz's murder trial. *Michigan v. Schmitz*, No. 198196 (Mich. Ct. App. Oct. 11, 1996). Court TV covered the trial. Steve Brill, chief executive officer of Court TV, promised, "If the episode is shown at the trial, then we will air it." *Court TV to Air 'Jones' Outtake*, HOLLYWOOD REPORTER, Oct. 17, 1996, available in LEXIS, ENTRT Library, THR File. Brill kept his word, airing the segment on October 17, 1996. David Bianculli, *The Devil in Ms. Jones' Program: Show at Center of Murder Trial Rabble-Rouses in Worst Degree*, DAILY NEWS, Oct. 18, 1996, at 127. NBC's *American Journal* aired part of the tape on October 22, 1996, and NBC's *Dateline* aired part of it on October 25, 1996.

17. Vivian M. Baulch, *The 'Jenny Jones' Case: Chronology of a Murder Case*, DETROIT NEWS, Nov. 13, 1996, at A6.

18. *Jurors Back Leniency in TV Murder*, CHI. TRIB., Nov. 13, 1996, at 10 [hereinafter *Jurors Back Leniency*].

of depression that preceded the show's so-called "ambush."¹⁹ Schmitz's lawyer blamed *The Jenny Jones Show*.²⁰ A juror interviewed after the trial made clear that jurors felt the television show acted as a "catalyst" for the murder.²¹

The dead man's family filed a \$25-million wrongful-death suit against Schmitz, the TV show, its owner, Telepictures Productions, and its producer, Warner Brothers.²² The plaintiffs allege that none of

19. *Family Blames 'Jenny Jones Show' for Tripping Him: Man Who Killed Gay Admirer in 'Ambush TV' Case Gets 25-50 Years*, CHI. TRIB., Dec. 5, 1996, at 8.

20. Marks, *supra* note 15, at 12. Schmitz's attorneys attempted to have the trial judge, Francis O'Brien, removed. *Another Attempt to Remove Judge in Jenny Jones Case*, STATES NEWS BRIEFS, Aug. 23, 1996, available in LEXIS, News Library, Wires File. *Schmitz's Murder Trial Set for Oct. 7*, DETROIT NEWS, Aug. 11, 1996, at B3.

Interestingly, the district attorney originally prosecuting the Schmitz case also prosecuted Dr. Jack Kevorkian for assisting suicides. His handling of both cases may have contributed to the prosecutor's defeat for re-election in August 1996. He angered some members of the gay community by refusing to call Amedure's murder a hate crime. Brian Harmon, *Thompson Pins Loss on Kevorkian Case*, DETROIT NEWS, Aug. 8, 1996, at A1.

Jury selection in the trial began on October 10, 1996. Ron French & Doug Durfee, *Judge Bars Families from Schmitz Trial*, DETROIT NEWS, Oct. 11, 1996, at D2. The trial itself began on October 14, 1996. Ron French, *Schmitz, Amedure Families Make Peace: Both Lost Sons in the 'Jenny Jones' Case*, DETROIT NEWS, Oct. 16, 1996, at C1; Ron French, *'Jenny Jones' Witness Lays Out a Chilling Tale as Trial Begins*, DETROIT NEWS, Oct. 15, 1996, at A1; Todd Nissen, *Talkshow Murder Trial Opens in Michigan*, REUTERS FIN. SER., Oct. 14, 1996, available in LEXIS, News Library, REUTER File.

21. *Sharing the Guilt: A Jenny Jones Guest Is Convicted of Murder, But Jurors Blame TV Too*, PEOPLE, Nov. 25, 1996, at 97; Michael Freeman, *After Jenny, Tab TV Frets*, MEDIAWEEK, Nov. 18, 1996, at 9. See also Ron French, *Schmitz Guilty, Jurors Blast TV: They Call 'Jenny Jones' Show Catalyst for Slaying*, DETROIT NEWS, Nov. 13, 1996, at A1. Jones, the show's host, received much criticism for her court testimony disclaiming any knowledge of how her show was run. See Frazier Moore, *Jones' Show Still Traveling the Low Road*, CHI. TRIB., Dec. 2, 1996, at 8 (criticizing Jones' "playing dumb"); *Sharing the Guilt*, PEOPLE, *supra* (quoting Jones as testifying, "I don't produce the show, I don't book the show."); Marvin Kitman, *The Marvin Kitman Show: Jenny Jones Gets a Taste of Sauce for the Gander*, NEWSDAY, Nov. 18, 1996, at B21 (calling Jones' court appearance "[t]he best dramatic performance of the year" when "she recited those immortal lines, 'I don't know.' 'I don't recall.' 'I have no idea.'").

The show itself has also received criticism. See, e.g., Moore, *supra*; Editorial, *Despicable Tactics of 'Ambush TV' Should Cost its Originators Plenty*, SUN-SENTINEL (Fort Lauderdale), Nov. 17, 1996, at 6H; Caryn James, *Critic's Notebook: From Talk to Murder, Via TV*, N.Y. TIMES, Oct. 29, 1996, at C18. One commentator remarked, "That everyone can be played with in public without any risk to the players is a lethal assumption" *Serious Fun: The Jenny Jones Trial*, VILLAGE VOICE, Nov. 26, 1996, at 35.

Since Amedure's death, the show's ratings apparently have fallen. See Frederic M. Biddle, *The Silencing of Ambush-Style Talk Shows; Ratings Drop, Cancellations Follow 'Jenny Jones' Furor*, BOSTON GLOBE, Nov. 15, 1996, at D1 (noting 24% drop in ratings in one year). See also Michael Freeman, *supra*.

22. *'Jenny Jones' Lawsuit Will Stand, Judge Rules*, CHI. TRIB., Feb. 29, 1996, at 2; *Talk Show's Top Brass to Stand Trial*, COM. APPEAL, Feb. 29, 1996, at 11A. See also Ron French, *'Jenny Jones' Case Changing the Tone of TV Talk Shows*, USA TODAY, Feb. 28, 1996, at 6A.

the show's staff told Schmitz that the show would only deal with same-sex crushes, but told Amedure to hug and kiss Schmitz and also gave Amedure liquor to lower his inhibitions. In ruling against the defense motion to dismiss the case, Judge Gene Schnelz of the Oakland County Circuit Court in Pontiac, Michigan, asked the defense attorney, "Aren't you kind of playing with fire?" When the attorney answered that nothing indicated Schmitz was violence prone, the judge said, "Nor did you check. Is that negligence?"²³

The judge rejected the defense's argument that talk shows should receive the same First Amendment protections of any news medium, replying: "Excuse me, this isn't media. This is a television talk show."²⁴ The judge also rejected the argument that when guests left, the show's responsibility ended. He compared the situation to that of a tavern owner held responsible for the drunk-driving accident caused by a customer served too many drinks.²⁵

The activities of the persons involved in *The Jenny Jones Show* may well have been tacky. The pivotal question, however, is whether the activities of the show's personnel should lead to their legal liability for the murder of Scott Amedure. Should persons involved with the show have researched Jonathan Schmitz's background? If so, they *might* have learned of his bouts of depression and his suicide attempts.²⁶ But it is questionable how effectively they could have researched this aspect of his background given the fact that medical

23. *Michigan Judge Allows Lawsuit Over 'Jenny Jones' Killing*, LIABILITY WEEK, Mar. 4, 1996, available in 1996 WL 9457747 [hereinafter *Michigan Judge*]. Apparently, such "ambushes" are fairly common. See, e.g., Laura Myers, *New Study Says Talk Show Hosts 'Ambush' Guests 16 Times an Hour*, DETROIT NEWS, Nov. 17, 1995, at A6.

24. *Michigan Judge*, *supra* note 23; Ron French, *Judge Ready to Give 'Jenny Jones' Trial Prime-Time Slot*, DETROIT NEWS, Feb. 29, 1996, at D1.

25. Brian S. Akre, *Judge Allows 'Jenny Jones' Slaying Suit to Go to Trial: Court Rejects Argument of Threat to Free Speech in Action Against Show*, ROCKY MOUNTAIN NEWS, Feb. 29, 1996, at 37A. Charles G. Brown also used the tavern-liability language when talking about liability for the publishers of *Hit Man: A Technical Manual for Independent Contractors*:

[C]ivil suits against bartenders for serving intoxicated people have caused responsible bars to stop serving such people; civil suits against convenience stores for serving alcohol to minors have caused retailers to be more careful; civil suits against hotels for freely giving out room numbers to those who then rape the occupants have caused innkeepers to change this practice. Such defendants are not charged with being criminals—but they have been required to pay money to the victims for their negligence.

Charles G. Brown, *Murder by the Book, and its Consequences*, CHI. TRIB., Mar. 5, 1996, at 13.

26. *Jurors Back Leniency*, *supra* note 18; James, *supra* note 21. Schmitz's psychiatrist testified that Schmitz had told him about two suicide attempts. Ron French, *In Pontiac: Psychiatrist Discusses Schmitz's Mental Problems*, DETROIT NEWS, Oct. 23, 1996, at C3.

records are closed. The show's personnel could ask all prospective guests to produce their medical records as a precondition to appearing on the show. Even so, problems remain: At what point does the risk presented by the prospective guest become too dangerous? Should the talk show have resident psychiatrists or psychologists to make this judgment call?

For how long should a talk show be liable? No violence erupted between Amedure and Schmitz on the show. In fact, Schmitz did not even appear upset.²⁷ Three days after the show, after an all-night drinking binge, he gunned down Amedure.²⁸ Should talk shows be required to monitor guests' subsequent activities, and if so, for how long?

If talk shows have this responsibility, could news programs escape similar liability? Although the judge in the pretrial hearing of *The Jenny Jones Show* civil suit seemed to be making a distinction between "media" and "talk shows,"²⁹ other courts have refused to do so. As the United States District Court for the Southern District of New York has stated, "[t]he scope of what constitutes a newsworthy event has been afforded a broad definition and held to include even matters of 'entertainment and amusement, concerning interesting phases of human activity in general. . . . [I]t is not for the courts to decide what matters are of interest to the general public.'"³⁰

If a journalist interviews a person about an accusation, and then the interviewee kills the accuser, should the journalist be held responsible? What if a news show arranges a face-to-face confrontation between the accused and the accuser? Should the broadcaster be liable for a subsequent murder? What if the murder occurs three days later? Are journalists responsible if, for example, an admiral, faced with questioning by reporters about whether he should be wearing a couple of combat "V" pins, commits suicide?³¹

27. French, *supra* note 26.

28. *Serious Fun*, *supra* note 21.

29. See *supra* note 24 and accompanying text.

30. *Ann-Margret v. High Soc'y Mag., Inc.*, 498 F. Supp. 401, 405 (S.D.N.Y. 1980) (citations omitted). The United States Supreme Court also seems reluctant to make value judgments where First Amendment protections are concerned. For instance, the Court has recognized the "traditional doctrine that liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods." *Branzburg v. Hayes*, 408 U.S. 665, 704 (1972).

31. In May 1996, Admiral Jeremy M. "Mike" Boorda committed suicide by shooting himself in the heart after learning that two reporters would question him later that day about the propriety of his wearing the bronze pins. See Bill McAllister & John Mintz, *Boorda May Have*

Another way to pose the question is this: Is it reasonably foreseeable that one human being will kill another who appeared on the same talk show or news show, or that a person facing questions will commit suicide? If one answers "yes," much investigative reporting as well as talk shows could slide down the slippery slope. The alternative is to recognize that confrontation is a daily part of life; murder is not. To try to apply rules of foreseeability to irrational behavior presents a conundrum of sorts: What would a reasonable, rational person expect an unreasonable, irrational person to do? Perhaps even harder is this question: When should a reasonable, rational person expect another person to be unreasonable and irrational? Should everyone have a duty to determine if the persons with whom they are dealing are rational or not? Perhaps the safer course would be for every individual to assume that everyone else is irrational. But the world of rationality would surely break down under this scheme of "everyone's crazy but you and me and I'm not sure about you." Absurd things happen, but to hold a person responsible for another person's absurdity is arguably the most absurd position of all. It could easily make a mockery of First Amendment freedom of expression and chill investigative reporting as well as talk shows.

b. News Show

In May 1993, a Rhode Island woman came home to find her mentally ill husband, Bruce Clift, threatening suicide. He had turned on a gas jet and then started firing guns. Police surrounded the home, and the wife left. While an experienced police officer attempted to dissuade Clift from killing himself, reporters gathered outside the home. Then Clift received a phone call from a broadcast reporter who had not asked police for permission to contact Clift. She taped an interview with Clift and told him she would broadcast it. At 6:04 p.m., the reporter appeared on a newscast, live from the scene. She told viewers:

It's obvious we're dealing with a very troubled man. . . . I asked him if he wanted us to broadcast a message for him. He agreed. What you're about to hear is a man who is angry at the world and could be on the verge of suicide. It's an interview you'll only see on Channel 12.³²

Worn Right Medials: 1965 Manual Seems to Support Use of 'V' Pins, WASH. POST, May 18, 1996, at A1. See also Jeff Stein, *The 'V' That Time Forgot: In 1965, Mike Boorda and his Ship Went to War. Here's the Untold Story of That Voyage*, WASH. POST, July 21, 1996, at C1.

32. Clift v. Narragansett Television, 688 A.2d 805, 806 (R.I. 1996).

During the interview, the reporter asked Clift, "[W]hat would you say to your wife. . . ?" He responded, "Only that I love her. . . . I apologize 'cause I know it's my fault. . . ." ³³ She also asked him, among other questions, "Are you scared?" and "Are you sick?" The reporter concluded her interview by saying, "Mr. Clift told me he would not surrender, and . . . he hung up the 'phone." At 6:07 p.m., Clift killed himself. Police rushed in and found his body. His television sets were playing Channel 12. ³⁴

Clift's wife sued the television station, claiming her husband's death was the result of the reporter's negligence. The trial judge granted the defendant station's motion to dismiss, ³⁵ but the Supreme Court of Rhode Island reinstated the suit. Relying on a medical doctor's affidavit, the court decided, "There were facts . . . that suggest the decedent's suicide resulted from an uncontrollable impulse that was brought about by a delirium or insanity caused by Narragansett's negligence." ³⁶ The trial judge mistakenly tried to determine the affidavit's truth, the appeals court said, instead of leaving that determination to a jury. The issues of fact the affidavit raised, the court said, are whether the reporter's call "exacerbated" Clift's pre-existing "self-destructive impulses" and the likelihood he would have killed himself when he did if the reporter had not called. ³⁷

2. Movies

Oliver Stone's 1994 movie, *Natural Born Killers*, ³⁸ tells the tale of two young lovers who murder their parents and then continue on a violent crime spree. The movie has been blamed for a dozen or so "copy cat" murders in the United States and Europe. ³⁹ On March 8,

33. *Id.* at 806.

34. *Id.* at 807.

35. *Id.*

36. *Id.* at 805.

37. *Id.*

38. *NATURAL BORN KILLERS* (Warner Bros. 1994).

39. For instance, a Georgia teenager allegedly killed an elderly man and then proclaimed on TV, "I'm a natural born killer"; a 14-year-old Texas boy allegedly watched the movie and then decapitated a 13-year-old girl; and a Utah teenager put on glasses and shaved his head to look like one of the characters in *Natural Born Killers*, then allegedly killed his sister and stepmother. Dante Ramos, *Screening Violence*, NEW ORLEANS TIMES PICAYUNE, Aug. 6, 1996, at A1. See also Adam Sandler, *Grisham vs. Stone: 'Killer' Opponents*, VARIETY, June 17, 1996, at 11. All of the incidents are covered in Michael Shnayerson, *Natural Born Opponents*, VANITY FAIR, July 1996, at 100.

Among other movies allegedly inspiring copy-cat deaths are: *THE MONEY TRAIN* (Columbia 1995); *CHILD'S PLAY 3* (United Artists 1993); and *THE DEER HUNTER* (EMI Universal 1981).

1995, Patricia Byers, a 37-year-old convenience store clerk in Ponchatoula, Louisiana, was paralyzed by a bullet to her neck. A videotape recorded the shooting by a young Oklahoma couple who allegedly watched Stone's movie over and over and ingested LSD before starting a crime spree that included killing a Mississippi man.⁴⁰ Byers filed a \$20 million negligence suit against Stone and Warner Brothers, among others,⁴¹ for their "distributing a film which they knew or should have known would cause and inspire people to commit crimes; and for producing and distributing a film which glorified the type of violence committed."⁴²

The Mississippi victim, gunned down at his cotton gin, was William Savage, a friend of John Grisham, the lawyer who authored *The Firm*.⁴³ Grisham, reflecting on death and the movie, urged a products liability theory for recovery. Writing in *The Oxford American*, he said:

Think of a film as a product. Something created and brought to market, not too dissimilar from breast implants. Though the law has yet to declare movies to be products, it is only one small step away. If something goes wrong with the product, whether by design or defect, and injury ensues, then its makers are held responsible. . . .⁴⁴

Jonathan Freedland, *Is Oliver Stone Responsible for the Consequences of this Film?* GUARDIAN (London), June 19, 1996, at T012.

The film *Boulevard Nights* led to a murder, the plaintiffs argued in an unsuccessful suit in 1982. See *infra* notes 225-228 and accompanying text.

40. Elizabeth Gleick, *A Time to Sue: John Grisham Wants Oliver Stone to Pay for Movie-Inspired Mayhem*, TIME, June 17, 1996, at 90; Manny Gamallo, *Effects of Film Argued: Famous Names Enter Edmondson Case*, TULSA WORLD, June 13, 1996, at A1. See also Dante Ramos, *supra* note 39.

41. *Grisham Firmly Backs \$20M Suit vs. Oliver Stone*, BOSTON HERALD, July 10, 1996, at 17; Manny Gamallo, *supra* note 40. See also Tony Gallagher, *Stone's \$20m Lawsuit Over Copycat: Woman Paralyzed in Robbery Sues Director of Natural Born Killers*, DAILY MAIL (London), June 13, 1996, at 29.

The young woman who allegedly shot Patsy Byers is Sarah Edmondson, the daughter of an Oklahoma district judge, the niece of the Oklahoma attorney general, the granddaughter of a congressman, and the great niece of a governor who was also a congressman. Shnayerson, *supra* note 39, at 100. Patsy Byers' attorney, Joe Simpson, thought that the resources of Edmondson's family alone were sufficient to warrant a suit, but then he found out about the Oliver Stone connection through criminal court proceedings arising from the crime spree. Under a fluke in the Louisiana negligence law in effect at the time of the shooting, Stone could be liable for up to 50 percent of any damage awards Byers might win. *Id.* at 105.

42. Sandler, *supra* note 39.

43. Gleick, *supra* note 40; Gamallo, *supra* note 40.

44. Shnayerson, *supra* note 39 (quoting John Grisham in OXFORD AMERICAN (Spring 1996)). See also Sandler, *supra* note 39. For coverage of products liability theory and suits, see *infra* Part III (strict liability) and Part IV (endorsements and sponsorships).

This has sparked a war of words on First Amendment theory between the celebrated author and the movie-maker, Stone.⁴⁵

What Grisham fails to appreciate is that attempts such as his to censor Stone will not only chill Stone's freedom of expression, but will likewise plunge authors such as Grisham himself into an icy netherworld where the risk of creative expression is too great to take. Not only fictional works, but even news stories or historical accounts could inspire some persons to murder. From shoot-'em-up Westerns to retellings of war atrocities, from Shakespeare to the Bible, whether in the form of words on printed pages, celluloid tape played in movie theaters, or electronic broadcasts to homes, the uncertainties would be the same: Could one safely express violent themes? The more powerful the expression, the more inspirational or moving or real, then arguably the more dangerous the expression becomes. Should only bland accounts be tolerated? And how bland is bland enough to suit Grisham? One can only wonder if he would be willing or able to write under the conditions he wishes to impose on Stone.

3. Books

The seeds of a suit against a book publisher took root in 1993 when Lawrence Horn and James Perry entered a contract that Perry would kill Horn's former wife, the Horns' eight-year-old quadriplegic son, and the son's nurse. The intended victims lived in a Maryland suburb outside Washington, D.C.⁴⁶ Horn wanted to collect a \$1.7 million trust fund his son had received in the settlement of a medical malpractice suit.⁴⁷ Perry planned how to complete his side of the contract. He testified at his criminal trial that to kill the women he followed the 27 steps outlined in a \$10 book by "Rex Feral" entitled *Hit Man: A Technical Manual for Independent Contractors*.⁴⁸ Perry used the recommended weapon and a homemade silencer, he shot each woman through the eye three times, and he rubbed out the gun's serial number.⁴⁹

45. For the feud between Grisham and Stone, see Shnayerson, *supra* note 39, and *infra* notes 408-415 and accompanying text.

46. Jan Crawford Greenburg, *'Hit Man' Lawsuit Targets Publisher*, CHI. TRIB., Feb. 1, 1996, at 1.

47. Karl Vick, *Horn Convicted in Murders of Ex-Wife, Son and Nurse: Jury Finds He Conspired with Hit Man*, WASH. POST, May 4, 1996, at A1.

48. Kevin Simpson, *Contract Murder: By the Man or by the Book?* DENVER POST, Feb. 1, 1996, at B1.

49. *Rice v. Paladin Enters.*, 940 F. Supp. 836, 838-39 (S.D. Md. 1996).

Perry followed additional instructional references from *Hit Man* in planning and executing the murders, including how to solicit for and obtain prospective clients in need of murder for hire services; requesting up-front money for expenses; . . . [registering] at a motel in the vicinity of the crime, paying with cash, and using a fake license tag number; committing the murders at the victims' home; . . . [making] the crime scene look like a burglary; . . . [carrying] away the ejected shells; breaking down the gun and discarding the pieces along the roadside after the murders; and using a rental car, a stolen tag on the rental car, and the discarding of the tag after the murders.⁵⁰

He simply smothered the disabled son to death with a pillow.⁵¹ A jury convicted Perry and sentenced him to death.⁵² A jury convicted Horn in May 1996 and sentenced him to life in prison.⁵³

Meanwhile, in late January 1996, surviving family members sued the book publisher, Paladin Enterprises, Inc., seeking unspecified damages. One attorney for the family, Rod Smolla, a professor at the College of William and Mary Law School, said: "Our argument is that there is currently no [First Amendment] protection for speech that aids and abets an illegal transaction."⁵⁴

On July 22, 1996, Judge Alexander Williams, Jr., of the United States District Court in Greenbelt, Maryland, heard arguments on the defendants' summary judgment motion. The defendants' stipulated, in part:

Defendants concede, for purposes of this motion, and for no other purposes, that . . . in publishing, marketing, advertising and distributing *Hit Man* . . . , defendants intended and had knowledge that their publications would be used, upon receipt, by criminals and would-be criminals to plan and execute the crime of murder for hire, in the manner set forth in the publications.⁵⁵

50. *Id.* at 840.

51. Greenburg, *supra* note 46, at 1.

52. Simpson, *supra* note 48, at B1.

53. *Man Gets Life in Plot to Kill Ex-Wife, Disabled Son, Nurse*, BALTIMORE SUN, May 17, 1996, at 6B.

54. Greenburg, *supra* note 46. For more on the *Hit Man* case, see Jane Kirtley, *Hitting 'Hit Man' in the Pocketbook*, AM. JOURNALISM REV., Apr. 1996, at 51; Brown, *supra* note 25, at 13; *All Things Considered* (NPR radio broadcast, Feb. 10, 1996), Transcript #2119-4. Canada has banned two of Paladin Press' books, *Kill Without Joy* and *How to Kill I*. Other books by Paladin Press include *Counterfeit ID Made Easy*, *Homemade Semtex* and *Be Your Own Undertaker: How to Dispose of a Dead Body*. Andrea Neal, *In Defense of the Most Unsavory*, INDIANAPOLIS STAR, Mar. 14, 1996, at A8.

55. *Rice*, 940 F. Supp. at 836. See also Stuart Taylor, Jr., *A Constitutional Suicide Pact?*, LEGAL TIMES, Aug. 5, 1996, at 23. Taylor comments, "I like my freedom of speech as well as the next fellow, but I'm with Smolla on this one—at least on the summary judgment issue." *Id.*

On September 6, 1996, the trial court granted the defendant's motion for summary judgment. The court found that "Paladin engaged in a marketing strategy intended to attract and assist criminals and would-be criminals" and that "Paladin intended and had knowledge that their publications would be used . . . to plan and execute the crime of murder for hire, in the manner set forth in the publications."⁵⁶ Despite those findings, the court rejected the plaintiff's arguments for liability based on theories that included aiding and abetting,⁵⁷ incitement,⁵⁸ and negligence.⁵⁹

The court also said: "Whether there is a substantial connection or a causal nexus between a publication similar to the material in question and the ultimate acts of criminal defendants who are driven with *animus malus* and criminal intent, so as to support civil liability against the publishing company, has yet to be determined."⁶⁰ While

Bruce Fein also argues for liability in the *Hit Man* case:

An arch legal principle holds persons civilly liable for the criminal conduct of others in a variety of circumstances. Landlords are responsible for failing to undertake safety measures to protect tenants from crime that might reasonably be anticipated. Gun dealers are similarly liable for sale to customers who they had reason to believe would use the firearms in crime. Bar owners are open to liability for alcohol sales to intoxicants who subsequently commit mayhem in violation of DWI prohibitions. Further, owners whose property is used in crime expose themselves to forfeiture for neglecting reasonable precautions against such anti-social use. The theory behind these liability rules is sound and simple: Citizens and businesses are obliged to act reasonably to avoid assisting or facilitating crimes that might be reasonably anticipated. . . . As applied to Paladin Press, the theory makes a persuasive case for liability.

Bruce Fein, *Crime, Responsibility and Free Speech*, WASH. TIMES, Feb. 27, 1996, at A17. For more discussion by Bruce Fein, see *infra* notes 393 and 400 and accompanying text, and note 416.

56. *Rice v. Paladin Enters.*, 940 F. Supp. 836, 839 (S.D. Md. 1996).

57. *Id.* at 843. The court refused to apply holdings in criminal cases to the case at bar. *Id.*

58. The court considered the charge of "incitement to imminent, lawless activity" to be "the only category of unprotected speech under which *Hit Man* could conceivably be placed." *Id.* at 841. But the court found a lack of imminence in the fact that Perry committed the murders more than a year after purchasing the book. *Id.* at 847. As the court said, "Nothing in the book says 'go out and commit murder now!'" Thus the court characterized the language in *Hit Man* as "abstract teaching" instead of "incitement." *Id.* See also Mary Boyle, *Judge Says Constitution Protects Murder Manual*, CHATTANOOGA FREE PRESS, Aug. 31, 1996, at B8. For a discussion of the incitement standard, see *infra* Part V.

59. The court focused on the fact that *Hit Man* did not involve purely commercial speech. "It is well settled that commercial speech is speech which does 'no more than propose a commercial transaction,'" the court pointed out. *Rice*, 940 F. Supp. at 841 (citations omitted). Therefore, the court distinguished *Hit Man* from *Braun v. Soldier of Fortune Magazine, Inc.*, 968 F.2d 1110 (11th Cir. 1992), *cert. denied*, 506 U.S. 1071 (1993), where a jury found negligence liability based on a "gun for hire" ad. *Id.* at 848. For discussion of *Braun v. Soldier of Fortune*, see *infra* Part II.A.

60. *Rice*, 940 F. Supp. at 848 (footnote omitted).

the court is correct, an appellate court in *Hyde v. City of Columbia* did find negligence liability when a paper published the name and address of an abduction victim who was then stalked by her assailant.⁶¹ The *Rice* court did not engage in a foreseeability analysis, however.

Clearly, the court did not relish its action:

The Court reads *Hit Man* in its entirety. Its content is enough to engender nausea in many readers. This Court, quite candidly, personally finds the book to be reprehensible and devoid of any significant redeeming social value. Nevertheless, however loathsome one characterizes the publication, *Hit Man* simply does not fall within the parameters of any of the recognized exceptions to the general First Amendment principles of freedom of speech.⁶²

In short, in making its ruling in what the court called "a novel case with unprecedented future implications,"⁶³ the court bowed to what it considered to be First Amendment dictates, despite revulsion at the book's content. The plaintiffs are appealing the decision.⁶⁴

Granted, the defendant's concession that they intended their book to be used by criminals does not place the defendants in the most sympathetic light. Nevertheless, to censor so-called "how to" books creates a significant problem: How can one define a "how to" book? Clearly, any well-written, easy to understand work of fiction that explains the activities that are occurring could be used as a manual. A mystery novel, true-crime book, or a news account could provide all the information needed. The clearer the expression, the easier the book (or television show or movie) would be to follow as a model.

4. Newspapers and TV News

The events that led to the suit against a newspaper started when agents from the Federal Bureau of Alcohol, Tobacco and Firearms (ATF) raided the Branch Davidian compound outside Waco, Texas. The followers of David Koresh seemed prepared. They wore black

61. For discussion of *Hyde v. City of Columbia*, 637 S.W.2d 251 (Mo. App. 1982), cert. denied, 459 U.S. 1226 (1983), see *infra* notes 104-114 and accompanying text.

62. *Rice*, 940 F. Supp. at 849. See also Peter G. Chronis, *Lawsuit of Boulder Publisher Dismissed*, DENVER POST, Aug. 31, 1996, at B1.

63. *Rice*, 940 F. Supp. at 848. See also David Montgomery, *Hit Man Book Didn't Kill, Judge Rules: Md. Suit Argued Publisher Was Liable for 3 Murders*, WASH. POST, Aug. 31, 1996, at B1.

64. Karen Bowers, *If Books Could Kill . . . ; Paladin Press Notches a Victory in the Hit Man Case, but the Fight Isn't Over*, DENVER WESTWORD, Sept. 12, 1996, available in LEXIS, News Library, ALLNEWS File.

"commando-style" outfits and ski masks.⁶⁵ A shoot-out ensued, in which four ATF agents were killed and sixteen wounded. At least two of the Branch Davidian cult members died. ATF agent John Risenhoover received wounds to his right hip, upper leg, and ankle. In addition, he took four shots to the chest, but a bullet-proof vest protected him.⁶⁶

Risenhoover is suing the publishers of the *Waco Tribune-Herald* for negligence. The original suit alleged, in part, that "the *Waco Tribune-Herald* called David Koresh at the compound and informed him that it had an urgent message for him and the other members of the compound, which message informed them of an impending raid by ATF and other officials."⁶⁷ This allegation has been dropped from the suit.⁶⁸ The suit does allege, however, that the newspaper positioned vehicles, reporters, and photographic equipment outside the compound one or two hours before the agents' planned arrival. The suit claims this activity by the newspaper "warned and notified the occupants of the compound that a raid was to be conducted and enabled the occupants to prepare and forcibly resist the ATF agents

65. *Feds Work at Building Case Against Cult: 1 Member Arrested*, STAR TRIB. (Minneapolis), Mar. 11, 1993, at 6A.

66. Kathy Fair & Roy Bragg, *ATF Agent's Suit Claims Newspaper Warned Cult*, Hous. CHRON., Mar. 18, 1993, at 1A. On February 26, 1994, a federal grand jury in San Antonio acquitted 11 Branch Davidian members of conspiracy to murder and convicted seven members on lesser charges, including voluntary manslaughter and weapons violations. Risenhoover, standing outside the courtroom reportedly with tears in his eyes, commented, "We ought to just hang up our badges." Lee Hancock, *Branch Davidians Acquitted of Murder: 7 Found Guilty of Lesser Charges*, DALLAS MORNING NEWS, Feb. 27, 1994, at 1A.

67. Fair & Bragg, *supra* note 66. See also Pierre Thomas & Edward Walsh, *Agent Injured in Cult Shootout Sues Waco Newspaper*, WASH. POST, Mar. 18, 1993, at A17.

68. Telephone Interview with David Mills, Attorney, WACO TRIB.-HERALD, (Mar. 21, 1996); Telephone Interview with Mark England, Reporter, WACO TRIB.-HERALD, (Mar. 21, 1996). This now-deleted allegation of a call by the newspaper seems to have resulted from an ambiguity based on the word "England." According to England, David Koresh allegedly received a phone call from "England." The plaintiff's attorney apparently construed that statement to mean that Koresh received a call from Mark England, the reporter, instead of England, the country. As a result, Mark England became a named defendant in Risenhoover's suit. Telephone interview with Mark England, Reporter, WACO TRIB.-HERALD (Mar. 21, 1996). Judge Walter Smith dismissed Mark England as a defendant in July 1996. *Risenhoover v. England*, 936 F. Supp. 392, 411 (W.D. Tex. 1996).

In another suit, *Ballesteros v. Cox Texas Publications, Inc.*, 936 F. Supp. 392 (W.D. Tex. 1996), the allegation is that a TV photographer received a tip about the raid from a dispatcher for an ambulance company that was on standby. Unable to find the compound, the photographer allegedly stopped a postal carrier, who turned out to be Koresh's brother-in-law, who in turn tipped off Koresh. See Janet Elliott, *Paper Chase: Suit by ATF Agents Says Media Tipped Off Koresh*, LEGAL TIMES, Feb. 20, 1995, at 2.

and other law enforcement officials.”⁶⁹ The paper’s editor and spokesman, Bob Lott, responded, “The injuries to Agent Risenhoover and the deaths of and injuries to others are regrettable, but they were not caused by this paper.”⁷⁰ Over 50 plaintiffs joined in the suit against the *Waco Tribune-Herald*.⁷¹ Television station KWTX is also a defendant.⁷²

The defendants filed a motion for summary judgment with Judge Walter Smith of the United States District Court for the Western

69. Fair & Bragg, *supra* note 66. See also Thomas & Walsh, *supra* note 67; Sam Howe Verhovek, *Agent Injured by Cult Gunfire Blames Texas Newspaper in Lawsuit*, N.Y. TIMES, Mar. 18, 1993, at A16; J. Michael Kennedy, *Waco Paper Tipped Off Cult, Agent Says*, L.A. TIMES, Mar. 18, 1993, at A31; *FBI: Cult Members Seek Answer on Legal Fate*, CHI. TRIB., Mar. 18, 1993, at 4.

70. Hugh Aynesworth, *20 to 30 Cultists May Give Up After Next Meeting*, WASH. TIMES, Mar. 18, 1993, at A10. The ATF is part of the Treasury Department, which issued a report on the attack on the Waco compound. The report says that the ATF agents in command ordered the raid even though they knew in advance that cult members had been forewarned and even though the raid was not supposed to go forward if the “element of surprise” had been lost. Michael Tackett, *Cult Raid Bungled by ATF: Report Finds Supervisors Ignored Facts*, CHI. TRIB., Oct. 1, 1993, at 1; See, e.g., Marshall Ingwerson, *Report on Waco Attack Will Strengthen Case for Agency Shake-Up: ATF may be DOA*, CHRISTIAN SCI. MONITOR, Sept. 30, 1993, at 11. The House Judiciary Committee also conducted hearings into the disaster involving the Branch Davidian Compound. See, e.g., *Legal Expert Discusses House Hearing into Waco Disaster* (CNN News, television broadcast, Apr. 28, 1993, Transcript No. 299-5).

For articles exploring the broader question of cults and violence, see, for example, Barbara Kantrowitz with Andrew Murr, Peter Annin, Ginny Carroll & Tony Clifton, *Secrets of the Cult: The Messiah of Waco*, NEWSWEEK, Mar. 15, 1993, at 56; Kenneth L. Woodward with Charles Fleming, Spencer Ress, Scott Rafshoon & Elizabeth Ann Leonard, *Secrets of the Cult: A Tower of Babel*, NEWSWEEK, Mar. 15, 1993, at 60; Joe Treen, Joseph Harnes, Bob Stewart, Carlton Stowers, John Dunn & Anne Maier, *Zealot of God: On His Road to Armageddon, Would-Be Messiah David Koresh Seduced His Followers into a Life of Paranoia, Violence and Sexual Abuse*, PEOPLE, Mar. 15, 1993, at 38; Lance Morrow, *In the Name of God*, TIME, Mar. 15, 1993, at 24; Richard Lacayo, *Cult of Death; Holed up in a Texas Fortress, Koresh and His Followers Fervently Believe He is Christ—and Till Death Do Them Part*, TIME, Mar. 15, 1993, at 36.

71. Telephone interview with Mark England, Reporter, WACO TRIB.-HERALD, (Feb. 7, 1995). England characterizes the situation as one of being sued for “just being at the scene.” *Id.* According to Janet Elliott, more than 60 agents have filed suit against the newspaper, as well as a television station and an ambulance company. Damages sought add up to over \$1 billion. Elliott, *supra* note 68. *Texas Lawyer* also uses the number 60. *Media Can Be Sued By Davidian Raid Agents*, TEXAS LAW., Apr. 8, 1996, at 68. According to Lee Hancock, more than 70 agents and the families of the four ATF agents who died have joined the suit. Lee Hancock, *Waco News Media Facing Trial in '93 Branch Davidian Firefight*, DALLAS MORNING NEWS, Apr. 3, 1996, at A32. According to Quill, “More than 100 lawsuits have been filed by Bureau of Alcohol, Tobacco, and Firearms agents and their families against a Waco, Texas, newspaper and television station.” Michelle Millhollon, *Waco Redux: Lawsuits Filed By Federal Agents Against a TV Station and a Newspaper*, QUILL, Oct. 1, 1995, at 23.

72. Elliott, *supra* note 68; Hancock, *supra* note 71.

District of Texas.⁷³ The judge rejected the defendants' summary judgment motion, saying:

[C]ommon sense would dictate that a reporter on the scene would do everything possible to avoid detection in covering what is known to be a secret law enforcement operation. Instead, the media arrogantly descended on the compound as if the First Amendment cloaked them with immunity from acting as reasonable individuals under the circumstances. Their actions are particularly egregious when considered in light of the fact that they knew how dangerous Koresh and his followers were.⁷⁴

The judge concluded that it was "arguably foreseeable to the newspaper and KWTX that the failure to provide any guidelines or instructions to the reporters sent to the scene could result in the Davidians being alerted to the impending raid."⁷⁵

In the wake of the Waco tragedy and suit, the media have undertaken much second-guessing of themselves.⁷⁶ If a reporter had called Koresh's Branch Davidians to say, "Hey, the FBI is going to raid your compound momentarily," then liability would not seem so farfetched. The report would have displayed an *intent* to warn an armed compound of an impending invasion. To intentionally warn under such circumstances seems clearly to constitute aiding and abetting. From a journalistic perspective, to warn means becoming part of a story and influencing its outcome rather than remaining an objective reporter. Such a scenario would indeed be chilling. To impose liability on a reporter who warns would send a message to journalists that could be sent to *any* citizen—namely, do not interfere with authorities who are attempting to carry out an assignment. (The wisdom of the assignment itself constitutes a different question that shall not be broached here.)

73. Telephone Interview with Jim Treanor, Attorney, WACO TRIB.-HERALD (Nov. 21, 1995).

74. *Risenhoover v. England*, 936 F. Supp. 392, 409 (W.D. Tex. 1996).

75. *Hancock*, *supra* note 71. Judge Smith also said that journalists are "no more free to cause harm to others while gathering news than any other individual." *Risenhoover*, 936 F. Supp. at 404. See also Jane Kirtley, *Were the Media Negligent in Waco?* AM. JOURNALISM REV., June 1996, at 46.

76. See, e.g., SOC'Y OF PROF'L JOURNALISTS, WACO: WHAT WENT RIGHT AND WHAT WENT WRONG (Nov. 1993); Joe Holley, *The Waco Watch: From the Start of the Siege of the Cult Compound, the Press Came Under Fire*, COLUM. JOURNALISM REV., May-June 1993, at 50; Rebecca Trownson, *Deadly Finale at Mount Carmel Media's Role Under Scrutiny: Criticism Remains of Early Coverage*, HOUS. CHRON., Apr. 20, 1993, at 17A. For commentary on *Waco: What Went Right, What Went Wrong*, see Rebecca J. Tallent and J. Steven Smethers, *Feeding the Beast: Waco Coverage Driven by Technology, Competition*, QUILL, Nov./Dec. 1993, at 20; Max Jennings, *Bad Ethics Recipe? Task Force Guidance "Half Baked,"* QUILL, Nov./Dec. 1993, at 18.

Because the allegation that a reporter directly warned Koresh and his followers has fallen out of this case, the case as it now exists poses a scenario that is equally chilling, but in a different way. Imposing liability could cause profound damage to First Amendment freedoms. If mere presence constitutes a warning that leads to liability, then consider what message that liability sends to journalists. Journalists would, in essence, be told to *stay away* from any situation where authorities might attempt an invasion because the journalists' mere presence could constitute a warning. Besides high-profile incidents such as in Ruby Ridge, Idaho,⁷⁷ or in Waco, hostage situations often lead to invasions. Unfortunately, such situations are not that rare.

Should courts in effect discourage journalists from newsgathering on a matter of extreme public importance, specifically, how public authorities are performing (or misperforming) their public duties? A message of "stand back and let the authorities do their jobs as *they* see fit" would not seem compatible with the journalistic notion of performing a watch-dog function. If liability were found in Waco, journalists would not merely be told to stand back. They would be told to *stay away* from the scene lest their activity be viewed as a warning that bears the price tag of liability. This would not merely muzzle the watchdog; it would chain the watchdog away from the activity that needs watching. The restraining of journalists would harm the public interest, given the critical role the media plays in a democratic society by overseeing the authorities. Unleashing authorities while putting journalists on a short leash would be shortsighted, at best. Judges should wince at the thought of any decision that sends the message that armed authorities should be entitled to act while journalists are kept at bay.

77. At Ruby Ridge, FBI agents shot the fourteen-year-old son and the wife of white separatist Randall C. Weaver during a 10-day siege of his remote mountain home in 1992. A 24-member investigative team prepared a 524-page confidential study for the Justice Department, concluding that federal agents at Ruby Ridge violated both their internal policies and the United States Constitution. But the Clinton Administration, through Deval Johnston, Assistant Attorney General for Civil Rights, declined any prosecutions for civil rights violations. *See, e.g.,* David Johnston, *Idaho Siege Report Says F.B.I. Agents Violated Procedure*, N.Y. TIMES, Dec. 13, 1994, at A1. This decision provoked many angry commentaries. *See, e.g.,* James Bovard, *Open Season on Gun Owners?: Dubious Decision at Justice*, WASH. TIMES, Dec. 15, 1994, at A18; Michale Costello, *Feds Excuse Themselves for Civil Rights Abuses*, LEWISTON MORNING TRIB., (Maine) Dec. 10, 1994, at 10A.

These suits are but a few of the latest attempts to hold the press responsible for the misdeeds of an evil-doer⁷⁸—a “third-party tortfeasor”⁷⁹ or “intervening actor”⁸⁰ in the bloodless language of the law. What are the plaintiff’s chances in these suits? A look at prior case law gives some clues, but no definitive answers.

II

Negligence Precedents

A. *Soldier of Fortune*: A Frequent Defendant

Much sued, *Soldier of Fortune* magazine managed to slip through the legal net of negligence—until January 1993. The United States Supreme Court then decided not to hear the case of *Braun v. Soldier of Fortune Magazine, Inc.*, letting stand an award of \$4,375,000 to brothers Michael and Ian Braun for the murder of their father.⁸¹

The magazine, which caters to lovers of adventure, weaponry, and all things military, printed this ad in June 1985: “GUN FOR HIRE: 37-year-old professional mercenary desires jobs. Vietnam veteran. Discrete [sic] and very private. Bodyguard, courier and other special

78. Another suit in Texas involves the question of whether a newspaper is liable for injuries suffered by a photographer who was an independent contractor sent out by a newspaper to take a picture of a man accused of being a “drug czar” in earlier articles by that newspaper. The newspaper did not warn the photographer about the earlier articles. The man criminally assaulted the photographer, an occurrence which the photographer claims was reasonably foreseeable. *Gutierrez v. Scripps-Howard*, No. 06-91-00076 CV (El Paso, Jan. 8, 1992). The trial court granted a summary judgment to the newspaper, but the photographer appealed, and the Eighth District Court of Appeals in El Paso reinstated the suit. *Gutierrez v. Scripps-Howard*, 823 S.W.2d 969 (1992). The appeals court subsequently denied a motion for rehearing but did correct a factual error to reflect that the photographer was wearing a press pass at the time of the assault. 1992 Tex. App. LEXIS 403, at *3 (Feb. 12, 1992).

A situation abroad, which could not lead to suit in the U.S., certainly contributed to tragedy and raised ethical concerns. Jonathan Alter writes:

The appalling aftermath of the Beijing massacre is a reminder that the media can be used to imprison as well as liberate. The same Western TV transmissions that spread word of the democracy movement were later scanned by Chinese authorities to help round up suspects. But the dilemma for the press corps is not so much technological as moral.

Jonathan Alter, *Unwilling Informants? Candor in News Coverage Can Endanger Lives*, NEWSWEEK, June 26, 1989, at 29.

79. See, e.g., *Lockheed Aircraft Corp. v. United States*, 460 U.S. 190, 200 (1983); *Federal Marine Terminals, Inc. v. Burns Shipping Co., Ltd.*, 394 U.S. 404, 410 (1969).

80. See, e.g., *Sheridan v. United States*, 487 U.S. 392, 405 (“intervening actor”).

81. *Braun v. Soldier of Fortune Mag., Inc.*, 968 F.2d 1110 (11th Cir. 1992), cert. denied, 506 U.S. 1071 (1993).

skills. All jobs considered.”⁸² Michael Savage, the aptly named man from Knoxville, Tennessee, who placed the ad, received a call from Richard Braun’s business partner. On August 26, 1985, Savage and two other men waited in ambush in Atlanta, Georgia, as Braun and his 16-year-old son Michael drove down the driveway of their home. Using a MAC 11 automatic pistol, the hit-squad fired a bullet into the son’s thigh and wounded Braun, who rolled out of the car. As Braun lay on the ground, one of the assassins pumped two fatal bullets into Braun’s head.⁸³

During the ensuing wrongful-death trial against *Soldier of Fortune*, the sons maintained the magazine had been negligent in publishing the ad. The ad created an unreasonable risk that someone might hire Savage for violent criminal activity, the sons argued. Savage testified that he had no intention of soliciting anything but legitimate work, but most of the thirty to forty responses per week to the ad sought his services for murder, assault, or kidnapping.⁸⁴

The sons introduced evidence of prior links between the magazine’s personal ads and other violent crimes.⁸⁵ The jury brought back a verdict of \$2,375,000 in actual damages and \$10,000,000 in punitive damages. The trial court cut the punitive damages to \$2,000,000.⁸⁶ In August 1992, the United States Court of Appeals for the Eleventh Circuit upheld the judgment. The court approved of the trial court’s instruction to the jury that the magazine could be found liable if—“on its face”—“the ad in question contains a clearly identifiable unreasonable risk, that the offer in the ad is one to commit a serious violent crime, including murder.”⁸⁷ Note that the court said that the *risk* had to be “clearly identifiable,” not that the person who was at risk (the victim) had to be clearly identifiable or that the assailant had to be clearly identifiable.⁸⁸

82. *Braun*, 968 F.2d at 1112 (error in original).

83. *Id.*

84. *Id.*

85. *Id.* at 1112-13.

86. *Id.* at 1114.

87. *Id.* at 1114, 1118.

88. On the positive side for advertisers, the court of appeals said:

[W]hile defendants owe a duty of reasonable care to the public, the magazine publisher does not have a duty to investigate every ad it publishes. Defendants owe no duty to the plaintiffs for publishing an ad if the ad’s language on its face would not convey to the reader that it created an unreasonable risk that the advertiser was available to commit such violent crimes as murder.

Id. at 1120.

Soldier of Fortune attempted to cloak itself in the First Amendment.⁸⁹ Indeed, the trial judge stressed the importance of First Amendment considerations when he instructed the jury.⁹⁰ So did the Eleventh Circuit Court of Appeals in its opinion.⁹¹ The argument failed, however.⁹² The magazine stood stripped bare of First Amendment protection in this case.

But the magazine had won an earlier case, *Eimann v. Soldier of Fortune*,⁹³ brought by the mother and son of a Texas woman who was slain after her husband hired a hit man through an ad in the magazine. The jury awarded the mother and son \$9.4 million, but the United States Court of Appeals for the Fifth Circuit overturned the verdict.⁹⁴ In 1990, the Supreme Court let that appellate decision stand.⁹⁵ *Soldier of Fortune* escaped in the *Eimann* case because the judge instructed the jury that it could find the magazine liable if the ad “‘could reasonably be interpreted’ as an offer to engage in illegal activity.”⁹⁶ This standard was too burdensome for the magazine, the appellate court decided, because it could hold the magazine liable for crimes committed after the running of an ambiguous ad.⁹⁷

The *Eimann* ad was ambiguous: “EX-MARINES—67-69 ‘Nam Vets, Ex-DI, weapons specialist-jungle warfare, pilot, M.E., high risk assignments, U.S. or overseas.”⁹⁸ The ad in *Braun* was more direct—”Discrete [sic] and very private. . . . All jobs considered.”⁹⁹

89. *Id.* at 1116-17.

90. The judge said: “You should view the facts and these instructions with particular care in this case, in view of the First Amendment to the Constitution, which protects the free flow of truthful and legitimate information even when it is of a commercial rather than a political nature.” *Id.* at 1113.

91. The appellate court said, for instance: “This case poses a greater risk than one finds in ordinary commercial speech cases that a state’s regulatory regime or tort law will impermissibly chill publishers from printing commercial speech that enjoys First Amendment protection.” *Id.* at 1117.

92. The appellate court concluded that the negligence standard used by the trial court “satisfied the First Amendment’s interests in protecting the commercial and core speech at issue in this case.” *Id.* at 1118.

93. 880 F.2d 830 (5th Cir. 1989), *aff’d*, 493 U.S. 1024 (1990).

94. *Id.* at 831, 838.

95. *Eimann v. Soldier of Fortune Mag., Inc.*, 493 U.S. 1024 (1990).

96. *Eimann*, 880 F.2d at 835.

97. *Id.* at 837-38.

98. *Id.* at 831.

99. *Braun v. Soldier of Fortune Mag., Inc.*, 968 F.2d 1110, 1112 (11th Cir. 1992)(error in original), *cert. denied*, 506 U.S. 1071 (1993).

In letting these two decisions stand, the Supreme Court appears tacitly to agree that publishers can run ambiguous ads, but that they cannot safely run more direct ads that solicit violence.¹⁰⁰ After *Braun*, publishers must try to figure out which ads are safely ambiguous and which are too direct.

Language from *Braun* says that publishers can be found liable "only if the advertisement on its face would have alerted a reasonably prudent publisher to the clearly identifiable unreasonable risk of harm to the public that the advertisement posed."¹⁰¹ Of course, it is standard negligence law that if there is a foreseeable risk of harm that a reasonably careful person would avoid, the person taking the risk and causing the harm will pay the freight. But when is a risk clear enough?

In letting *Braun* stand, the Supreme Court tacitly acquiesced in a two-fold expansion of the liability of the press for *criminal* acts that indirectly result from publications. First, the press will be liable for harm caused by news stories which reporters write. Second, the press will be liable for advertisements submitted by outsiders as well. Screening, in itself, is perhaps not very burdensome. However, the second expansion is more burdensome—arguably a slide further down a slippery slope. Not only will the press be liable when harm is foreseeable to a specific individual, but also when there is a more nebulous risk to the public. In effect, publishers will be exposed to the possibility of a suit if they let a foreseeable public risk slip by.

Undoubtedly, publishers will feel some chill from trying to distinguish ambiguous, legally safe ads from ads that do pose a public

100. For commentary on *Braun*, see David W. Kantaros, *Case Comments: Constitutional Law Striking an Appropriate Balance Between Negligence and Freedom of the Press for Publishers*, 27 SUFFOLK U. L. REV. 244 (1993); Timothy J. Tatro, *Braun v. Soldier of Fortune: Tort Law Enters the Braun's Age as Constitutional Safeguards for Commercial Speech Buckle 'Neath the Crunch of Third-Party Liability*, 30 SAN DIEGO L. REV. 957 (Fall 1993). For commentary on *Eimann*, see Lisa F. Firenze, *Publishers' Liability for Commercial Advertisements: Testing the Limits of the First Amendment*, 23 COLUM. J.L. & SOC. PROBS. 137 (1990); J.D. Kilroy, *Recent Development: Eimann v. Soldier of Fortune Magazine, Inc.: Fifth Circuit Limits Publisher Liability for Ambiguous Advertisements*, 64 TUL. L. REV. 1288 (1990); Michael I. Meyerson, *This Gun for Hire: Dancing in the Dark of the First Amendment*, 47 WASH. & LEE L. REV. 267 (1990); Donald B. Allegro and John D. LeDue, *Case Comment: Eimann v. Soldier of Fortune and 'Negligent Advertising' Action: Commercial Speech in an Era of Reduced First Amendment Protection*, 64 NOTRE DAME L. REV. 157 (1989); Jan Jaben, *Publishers Applaud Ad Victor*, FOLIO, Oct. 1, 1989, at 41; Neil L. Shapiro & Karl Olson, *Advertiser Liability: Soldier of Fortune Cases Take Deadly Aim at Publishers*, 11 HASTINGS COMM/ENT L.J. 383 (1988).

For another case in which *Soldier of Fortune* was sued over an advertisement, see *Norwood v. Soldier of Fortune Magazine, Inc.*, 651 F. Supp. 1397 (W.D. Ark. 1987). There is no appellate decision in this case.

101. 968 F.2d at 1115.

threat by clearly soliciting criminal activity. Lawyers who advise the press may well have an increased workload. In fact, an appeals court judge who dissented in *Braun* wrote, "I remain convinced that the language of the advertisement is ambiguous, rather than patently criminal as the majority believes."¹⁰² On the other hand, it may not be as easy now for business partners and spouses to find assassins. *Soldier of Fortune* stopped publishing personal ads in 1986.¹⁰³

In the *Soldier of Fortune* cases, the courts had to balance interests. Here, First Amendment freedom of the press gave way to a perceived interest in protecting the public from ads that pose an unreasonable risk of violence. Although the guidelines are far from precise, the brunt of the *Braun* message is clear: The pen may be "mightier than the sword," but if the pen invites the sword, then the press better beware.

B. Even a "Public Records" Defense Can Be Inadequate

In 1983, the United States Supreme Court let stand a Missouri case, *Hyde v. City of Columbia*,¹⁰⁴ which allowed a negligence suit brought by Sandra Hyde against a newspaper, *The Columbia Daily Tribune*. As Hyde walked down the main street of Columbia, Missouri, after midnight in August 1980, a man with a red beard and red hair, driving a red Mustang, pulled alongside her. He opened his door, leveled a sawed-off shotgun at her, and ordered her to get in. She did. He then demanded, "You will do what I want you to do or I will blow your brains out." As he drove around a corner, Hyde jumped out of the car and ran to safety in a nearby disco. Hyde reported the incident to the police. Of course, she gave her name and address—facts which her assailant lacked until a *Tribune* reporter obtained a copy of the police report. The newspaper published her name and address the next day. Then, according to Hyde, the man started terrorizing her, stalking her at her home and workplace and making phone calls to give her messages such as, "I'm glad you're not dead

102. *Id.* at 1122 (Eschbach, J., dissenting).

103. Ron Martz, *Slain Man's Family Pleased at Court Ruling on Ad*, ATLANTA J. & CONST., Jan. 12, 1993, at A4; *High Court Rejects Free-Press Arguments in 2 Cases*, DALLAS MORNING NEWS, Jan. 12, 1993, at A4.

104. *Hyde v. City of Columbia*, 637 S.W.2d 251 (Mo. App. 1982), *cert. denied*, 459 U.S. 1226 (1983). For commentary on the case, see Douglas O. Linder, *When Names Are Not News, They're Negligence: Media Liability for Personal Injuries Resulting from the Publication of Accurate Information*, 52 UMKC L. REV. 421 (1984).

yet, I have plans for you before you die," and, "I wanted to refresh your memory of who I am before I kill you tonight."¹⁰⁵

Hyde sued, alleging negligence by the city in disclosing her name and address and negligence by the newspaper in printing her name and address.¹⁰⁶ The defendants countered that the disclosed information was a public record under Missouri's Sunshine Law.¹⁰⁷ The trial court ruled in favor of the defendants, accepting the public-record defense.¹⁰⁸ However, the Court of Appeals for the Western District of Missouri reversed and held that Sandra Hyde did indeed have valid grounds to sue for negligence. The court concluded: "[I]t was reasonably foreseeable that the publication of the name and address of the victim, while the assailant was still at large, was a temptation to [the assailant] to inflict an intentional harm upon the victim—a foreseeable risk the . . . defendants had a duty to prevent."¹⁰⁹

In flatly rejecting the "Sunshine Law" defense, the court used the following *reductio ad absurdum* argument:

To construe the Sunshine Law to open *all* criminal investigation information to *anyone* with a request . . . courts constitutional violations of the right of privacy of a witness or other citizen unwittingly drawn into the criminal investigation process Such a construction leads to the absurdity . . . that an assailant unknown as such to the authorities, from whom the victim has escaped, need simply walk into the police station, demand name and address or other personal information without possibility of lawful refusal, so as to intimidate the victim as a witness or commit other injury.¹¹⁰

To avoid what the court called an "absurd" conclusion, it held that "the name and address of a victim of crime who can identify an assailant not yet in custody is not a *public record* under the Sunshine Law."¹¹¹

By letting the *Hyde* case stand, the United States Supreme Court sent the message that newspapers could be found liable for printing a news story that exposed a specific victim to an unreasonable, foreseeable risk of harm—even though the defendant arguably was

105. 637 S.W.2d at 253-55 n. 2.

106. *Id.* at 255-56.

107. *Id.* at 254, 258.

108. *Id.* at 254.

109. *Id.* at 273.

110. *Id.* at 263.

111. *Id.*

using public records. In fact, a California appeals court cited *Hyde* when it let a woman sue the *Los Angeles Times* after the paper reported her name in connection with her discovery of the dead, nude body of her roommate who had been beaten, raped, and strangled.¹¹² The reporter, a summer intern, obtained the name through the coroner's office.¹¹³ Again, the court did not accept the public-record defense.¹¹⁴

A case with facts similar to *Hyde's* but an opposite result is *Florida Star v. B.J.F.*, which the United States Supreme Court did review.¹¹⁵ On First Amendment grounds, the Court overturned compensatory and punitive damage awards to a rape victim whose name had been accidentally printed by the newspaper. A Florida statute prohibited publication of rape victims' names,¹¹⁶ and the victim sued for the paper's negligent violation of the statute. The paper's problems arose when a reporter-trainee wrote a verbatim copy of a police report on a "blank duplicate" of the police form. A reporter then wrote a paragraph about the crime, which the paper published in its "Police Reports" section along with fifty-three other entries under the subheading of "Robberies."¹¹⁷ The published paragraph said:

[B.J.F.] reported on Thursday, October 20, she was crossing Brentwood Park, which is in the 500 block of Golfair Boulevard, enroute to her bus stop, when an unknown black man ran up behind the lady and placed a knife to her neck and told her not to yell. The suspect then undressed the lady and had sexual intercourse with her before fleeing the scene with her 60 cents, Timex watch and gold

112. *Times Mirror Co. v. Superior Ct. of San Diego County*, 244 Cal. Rptr. 556 (Cal. Ct. App. 1988).

113. *Id.* at 558.

114. *Id.*

115. 491 U.S. 524 (1989).

116. Section 794.03 of the Florida code is still on the books, although the Supreme Court severely criticized it in *B.J.F.*, 491 U.S. at 539-41, and although a Florida trial court found it unconstitutional in the prosecution of *The Globe* for naming the rape victim in the William Kennedy Smith rape trial. See, e.g., *Tabloid is Cleared in Kennedy Rape Case*, Hous. Chron., Oct. 25, 1991, at 18A; Timothy Clifford, *Ban on Naming Victim Thrown Out*, NEWSDAY, Oct. 25, 1991, at 4; *Florida Law Struck Down Barring Rape Victim Name Disclosure*, UPI, Oct. 24, 1991, available in LEXIS, NEXIS Library, UPI file.

The Florida Court of Appeal for the Fourth District agreed with the trial court that the statute is unconstitutional. *Florida v. Globe Comm. Corp.*, No. 91-3112, 1993 Fla. App. LEXIS 7991 (Fla. App. Aug. 4, 1993); *Appeals Panel Throws Out Rape Statute*, UPI, Aug. 5, 1993, available in LEXIS, NEXIS Library, UPI file.

117. *B.J.F.*, 491 U.S. at 527.

necklace. Patrol efforts have been suspended concerning this incident because of a lack of evidence.¹¹⁸

In the wake of this publication, B.J.F.'s mother received calls from a man threatening to rape B.J.F. again. Testifying about her emotional distress, B.J.F. said she had to move, change her phone number, seek police protection, and consult a mental-health counselor.¹¹⁹

The similarities between *B.J.F.* and the *Hyde* case are obvious: a newspaper used a police report to name a victim whose assailant previously did not know her name and who was still at large. However, the Court let *Hyde* stand, but it reversed *B.J.F.* It is important to note that the decision in *B.J.F.* is a narrow one. While the Court held that "imposing damages on appellant for publishing B.J.F.'s name violates the First Amendment," the Court also specifically declined "to hold broadly that truthful publication may never be punished consistent with the First Amendment."¹²⁰ The Court made clear in *B.J.F.* that it would decide such cases on a case-by-case basis, carefully weighing the interests presented by each particular case: "We continue to believe that the sensitivity and significance of the interests presented in clashes between First Amendment and privacy rights counsel relying on limited principles that sweep no more broadly than the appropriate context of the instant case."¹²¹

But the Court did seem to offer greater protection when public records are used. Showing concern that "timidity and self-censorship" by the media could occur, the Court said:

A contrary rule depriving protection to those who rely on the government's implied representations of the lawfulness of dissemination, would force upon the media the onerous obligation of sifting through government press releases, reports and pronouncements to prune out material arguably unlawful for publication. This situation could inhere even where the newspaper's sole object was to reproduce, with no substantial change, the government's rendition of the event in question.¹²²

Although comforting, this broad statement by the Court is merely dictum. The opinion in *B.J.F.* emphasizes the importance of case-by-case determinations. The Court, in discussing protection of news

118. *Id.* at 527. This was the first time the newspaper had published a rape victim's name. See Linda Greenhouse, *Supreme Court Roundup: First Amendment Protects Paper that Named Rape Victim, Justices Rule*, N.Y. TIMES, June 22, 1989, at B9.

119. *B.J.F.*, 491 U.S. at 528.

120. *Id.* at 532.

121. *Id.* at 533.

122. *Id.* at 536.

media that use information released by the government, was applying its earlier decision in *Smith v. Daily Mail Publishing Co.*¹²³ The Court in *Daily Mail* held in 1979 that a state cannot punish truthful publication by a newspaper of the lawfully obtained name of a juvenile who allegedly committed murder.¹²⁴ The Court in *B.J.F.* applied the following principle from *Daily Mail*: "If a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order."¹²⁵

In 1983, the Court let the *Hyde* decision stand,¹²⁶ thereby permitting a negligence action against a newspaper that printed the name of an abduction victim—a name lawfully received from a government agency, the police department.¹²⁷ Also sobering is the United States Supreme Court's letting stand a more than \$4.3 million judgment against *Soldier of Fortune* magazine in 1993.¹²⁸

In short, no Supreme Court decision exists which grants blanket immunity from liability to news media that publish information that reasonably prudent journalists would not print. If there is foreseeability of harm, and the harm occurs, the media may face liability for negligence even if the information comes from police records or other government sources.¹²⁹

123. 443 U.S. 97 (1979). For discussion of *Daily Mail* in *B.J.F.*, see 491 U.S. at 533-37.

124. See 443 U.S. at 101-06.

125. *B.J.F.*, 491 U.S. at 533 (quoting *Daily Mail*, 443 U.S. at 103). The Texas Court of Appeals for the Second District cited *B.J.F.* for its use of the principle from the *Daily Mail* opinion that publication of information which is lawfully obtained may only be punished if the state establishes "an interest of the highest order" which must be protected. *Doe v. Star Telegram, Inc.*, 864 S.W.2d 790, 792 (Tex. App. 1993). Jane Doe sued the *Star Telegram* for invasion of privacy after it published two articles about a sexual assault on her. Although the paper did not use her name, it printed that she was the owner of a business and published her business address along with the make and model of her car. The trial court granted the newspaper's motion for summary judgment, but the appeals court remanded the case on the sole issue of whether the newspaper obtained the information lawfully. *Id.* at 791.

126. *Hyde v. City of Columbia*, 459 U.S. 1226 (1983).

127. *Hyde*, 637 S.W.2d at 253-55.

128. See *supra* notes 81-103 and accompanying text.

129. The government source was the coroner's office in the 1988 *Times-Mirror* case. *Times Mirror Co. v. Superior Ct. of San Diego County*, 244 Cal. Rptr. 556, 558 (Cal. Ct. App. 1988). See *supra* note 112 and accompanying text on the *Times-Mirror* case.

III Strict Liability

A. Can the Printed Word Be a Product?

When the printed word has been part of a chain of events leading to physical harm or even death, plaintiffs have sometimes asked courts to treat the printed word like any other commercial product and to hold publishers liable under a theory of strict liability. With only two exceptions, such attempts have failed. In the first exception, courts have held the publishers of faulty aeronautical charts liable for the disasters they have caused. In the second, courts have assigned liability when the printed word appeared as a warranty. Otherwise, attempts to treat the printed contents of magazines, newspapers, or books as products have failed. Courts have looked beyond product liability theory into the Constitutional heart of the matter—the First Amendment.

1. A Magazine With a Supplement on Shooting Sports Prevailed in a Strict Liability Case

A 1993 Texas case demonstrates the power of the First Amendment as a shield when plaintiffs argue that words on a printed page constitute a mere product. The facts of *Way v. Boy Scouts of America*¹³⁰ are compelling. A 12-year-old boy named Rocky died when he and some friends were playing with a rifle that discharged. They had been reading an issue of *Boys' Life*, a magazine published by the Boy Scouts of America, which included a 16-page advertising supplement on shooting sports and how to earn merit badges for shooting. Rocky's mother sued, claiming the supplement caused her son's death. Her theories were negligence in publishing the supplement and strict liability for a defective product, namely, the magazine with its supplement.¹³¹

The appellate court rejected her negligence claim, concluding that Rocky's "experimentation" with the rifle was not a reasonably foreseeable consequence of the supplement.¹³² Rocky had been unsupervised, while the supplement emphasized the importance of supervision and safe and responsible gun use.¹³³ Weighing the three

130. 856 S.W.2d 230 (Tex. App. 1993).

131. *Id.* at 232.

132. *Id.* at 236.

133. *Id.*

factors of negligence—risk, foreseeability, and likelihood of injury—against the social utility of the conduct,¹³⁴ the court said:

Given the pervasiveness of firearms in society, we conclude that encouragement of safe and responsible use of firearms by minors in conjunction with Boy Scout and other supervised activities is of significant social utility. Also included in our consideration of the social utility of publishing the supplement is our recognition of the pervasiveness of advertising in society and the important role it plays. . . . The weight we attach to the social utility of advertising in this case is further strengthened by the fact that the supplement provided useful information about lawful products.¹³⁵

Turning to the question of strict liability, the court noted that the Texas Supreme Court had adopted the strict liability theory of the *Restatement (Second) of Torts* section 402A, which states: “(1) one who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his [or her] property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his [or her] property”¹³⁶

The court noted that to have a cause of action for products liability, one must first have a “product” falling within the definition of the *Restatement (Second) of Torts*.¹³⁷ In this case, however, the court

134. *Id.* at 234.

135. *Id.* at 236 (citation omitted).

136. The passage continues:

[I]f

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his [or her] product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

RESTATEMENT (SECOND) OF TORTS, § 402A (1965), *quoted in Way*, 856 S.W.2d at 238. Courts and scholars recognize the pervasiveness of this section of the *Restatement (Second) of Torts*. As professors Henderson and Twerski wrote:

Only rarely do provisions of the American Law Institute's Restatements of the Law rise to the dignity of holy writ. Even more rarely do individual comments to Restatement sections come to symbolize important, decisive developments that dominate judicial thinking. Nevertheless, section 402A of the *Restatement (Second) of Torts* is such a provision. Literally thousands upon thousands of products liability decisions in the past twenty-five years have explicitly referred to, and come to grips with, that section.

James A. Henderson, Jr., & Aaron D. Twerski, *A Proposed Revision of Section 402A of the Restatement (Second) of Torts*, 77 CORNELL L. REV. 1512 (1992).

137. *Way*, 856 S.W.2d at 238.

said the dead boy's mother was not claiming that the physical condition of the magazine itself was dangerous but that its "ideas and information" encouraged children to engage in dangerous activities.¹³⁸ Ideas and information are "intangible characteristics, not tangible properties," according to the court.¹³⁹ Drawing a distinction between "tangible and intangible aspects of a publication," the court quoted this passage from a federal case: "A book containing Shakespeare's sonnets consists of two parts, the material and the print therein, and the ideas and expression thereof. The first may be a product, but the second is not. Products liability law is geared to the tangible world."¹⁴⁰ The court concluded that the "ideas, thoughts, words, and information conveyed" by *Boys' Life* and its supplement did not constitute a product.¹⁴¹

2. The Publisher of a Textbook Giving Medical Advice Prevailed

In 1988, a federal trial court in Maryland also ruled against a plaintiff's strict liability claim. The case of *Jones v. J.B. Lippincott Co.*¹⁴² involved an unfortunate, constipated nursing student who treated herself with a hydrogen peroxide enema after consulting a textbook published by J.B. Lippincott. She injured herself and then sued. In rejecting her strict liability claim, the court pointed out that other courts have applied strict liability to publishers only in cases involving aeronautical maps or charts.¹⁴³ In applying strict liability in those cases, courts drew an analogy between airline charts and other devices for navigation, such as compasses or radar finders, which would prove dangerous if defective.¹⁴⁴ The court said: "No case has extended Section 402A to the dissemination of an idea or knowledge

138. *Id.* at 239.

139. *Id.*

140. *Winter v. G.P. Putnam's Sons*, 938 F.2d 1033, 1034 (9th Cir. 1991), quoted in *Way*, 856 S.W.2d at 239. *Winter* involved plaintiffs who read *The Encyclopedia of Mushrooms*, gathered and ate poison mushrooms, and then sued. See *infra* notes 185-187 and accompanying text.

The court in *Way* also quoted *Herceg v. Hustler Magazine*: "The Court is aware of no court which has held that the content of a magazine or other publication is a product within the meaning of § 402A of the Second Restatement of Torts. Rather, they have held to the contrary." *Way*, 856 S.W.2d at 239 (quoting *Herceg v. Hustler Mag.*, 565 F. Supp. 802, 803 (S.D. Tex. 1983)). For a discussion of *Herceg*, see *infra* notes 268-272 and accompanying text.

141. *Way*, 856 S.W.2d at 239. For discussion of *Way* and related cases, see *Special Report: Products Liability Claims Against Publishers: Can Information Be a Defective Product?*, BNA PRODUCT LIABILITY DAILY, Nov. 29, 1993, available in LEXIS, BNA Library, BNAPLD File.

142. 694 F. Supp. 1216 (D. Md. 1988).

143. *Id.* at 1217.

144. For the cases on aeronautical charts, see *infra* notes 147-157 and accompanying text.

in books or other published material. Indeed to do so could chill expression and publication which is inconsistent with fundamental free speech principles."¹⁴⁵

In granting summary judgment to the book publisher, the trial court said Lippincott had made no warranties regarding the content of the book and owned no duty of care to the injured woman. The court applied this doctrine: "If a publisher serves the function of publishing the contents of an author, other than one of its own employees for whom it would be liable under the doctrine of *respondeat superior*, it has no duty for the contents."¹⁴⁶

3. Publishers of Aeronautical Charts Lost for Producing "Defective" Products

As examples of courts holding a company responsible for the aeronautical charts it produced, two courts held Jeppesen & Company liable in 1985. In *Brocklesby v. United States*,¹⁴⁷ the Ninth Circuit Court of Appeals found that a graphic approach chart is a "product" and that it was a "defective product for purposes of analysis under section 402A."¹⁴⁸ Jeppesen had used Federal Aviation Administration data to create a chart for the airport at Cold Bay, Alaska. Six crew members who relied on the faulty chart died in a resulting airplane crash.¹⁴⁹ The court concluded that all requirements for strict liability under section 402A of the *Restatement (Second) of Torts* had been met.¹⁵⁰ Had Jeppesen merely republished government data, the court

145. *Lippincott*, 694 F. Supp. at 1217 (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)). In *Gertz*, the Supreme Court held "so long as they do not impose liability without fault," states could decide for themselves the "appropriate standard of liability" for media that libel private individuals. *Id.* at 347. The Court explained its reasoning for rejecting strict liability: "Our decisions recognize that a rule of strict liability that compels a publisher or broadcaster to guarantee the accuracy of his [or her] factual assertions may lead to intolerable self-censorship." *Id.* at 340.

146. *Lippincott*, 694 F. Supp. at 1216-17 (citations omitted)(emphasis added).

147. 767 F.2d 1288 (9th Cir. 1985).

148. *Id.* at 1295. Mass production and mass distribution are key elements for courts to find charts to be products under section 402A. See, e.g., *Halstead v. U.S. Jeppesen & Co.*, 535 F. Supp. 782 (D. Conn. 1982):

Jeppesen mass produced and distributed thousands of charts on the aviation market. Implicit in their presence on the market was the representation that the purchaser could rely on their information safely. Exposing defendant Jeppesen's conduct to strict products liability is thus entirely appropriate. Hence, this court finds that the Jeppesen navigational charts are products for the purposes of § 402A of the *Restatement (Second) of Torts* (1965).

Id. at 791.

149. *Brocklesby*, 767 F.2d at 1291.

150. *Id.* at 1294-96.

said, Jeppesen would not have been liable, but the charts were a conversion, not a mere republication, of the government data.¹⁵¹ The charts were instead a new product. Further, Jeppesen had made the following representation about its charts:

When pilots compare approach plates . . . for information, for readability . . . they choose Jeppesen. Why? Because the format of Jeppesen charts was designed by pilots, for pilots, and has been time-tested and proven by instrument pilots throughout the world. Every necessary detail is clearly indicated Jeppesen approach plates include . . . EVERYTHING you need for a smooth transition from enroute to approach segment of your flight.¹⁵²

A California appeals court also found liability in *Fluor Corp. v. Jeppesen & Co.*,¹⁵³ which involved a Lockheed Jet Star that crashed into the side of Johnson Hill in New York, killing everyone on board. Johnson Hill was not listed on Jeppesen's chart. The trial court did not instruct the jury about strict products liability.¹⁵⁴ The appellate court reversed, saying, "At a minimum . . . the court should have informed the jury that this chart could 'be found defective in design'"¹⁵⁵ According to the court, characterizing the charts as products would serve the policy of protecting defenseless victims and spreading the cost of compensating them.¹⁵⁶ As the court pointed out, "here the inclusion of Johnson Hill on respondent's chart in accordance with its own design rules apparently could have been accomplished with ease at negligible cost. . . ."¹⁵⁷

151. *Id.* at 1298.

152. *Id.* at 1298. *Cf. Hanberry v. Hearst Corp.*, 81 Cal. Rptr. 519 (Cal. Ct. App. 1969), discussed *infra* notes 230-236 and accompanying text where a *Good Housekeeping* warranty led to liability.

153. 216 Cal. Rptr. 68 (Cal. Ct. App. 1985).

154. *Fluor*, 216 Cal. Rptr. at 70.

155. *Id.* at 73.

156. *Fluor*, 216 Cal. Rptr. at 71 (quoting *Campbell v. General Motors Corp.*, 32 Cal. 3d 112, 112 (1982)).

157. *Fluor*, 216 Cal. Rptr. at 72. Jeppesen has been a frequent defendant. In *Saloomey v. Jeppesen & Co.*, 707 F.2d 671 (2d Cir. 1983), *aff'g* *Halstead v. United States*, 535 F. Supp. 782 (D. Conn. 1982), a Jeppesen chart indicated that a West Virginia airport contained a "full instrument landing system." It did not, and a fatal plane crash occurred. *Saloomey*, 707 F.2d at 673. The appellate court found "adequate evidence" to uphold the jury's finding that the chart was defective. *Id.* at 677.

In *Aetna Casualty and Surety Co. v. Jeppesen & Co.*, 463 F. Supp. 94 (D. Nev. 1978), *rev'd on other grounds*, 642 F.2d 339 (9th Cir. 1981), a plane crashed as it approached the Las Vegas, Nevada airport. The appellate court agreed with the trial court that the chart was "unreasonably dangerous and a defective product." Jeppesen did win an earlier case. *Times Mirror Co. v. Sisk*, 593 P.2d 924 (1978), involved the crash of a Pan Am 707 cargo jet into Mt. Kamunay in the

4. *The Publisher of Tire-Dimension Standards Prevailed*

Theories of strict liability and breach of warranty failed in a 1985 New York case, *Beasock v. Dioguardi Enterprises*.¹⁵⁸ A man died when the 16-inch truck tire he was trying to inflate on a 16.5-inch rim exploded.¹⁵⁹ The defendant, Tire and Rim Association (TRA), published dimensional standards, allowing persons to interchange tires and rims produced by different manufacturers.¹⁶⁰ The court pointed out that TRA did not manufacture either the tire or rim and concluded:

The only products TRA is responsible for placing in the stream of commerce are its publications. Although these publications contained the dimensional specifications for the tire and rim in question, the publications themselves did not produce the injuries and thus cannot serve as the basis for the imposition of liability¹⁶¹

5. *The Publisher of a Science Textbook Prevailed*

Prior to *Beasock*, another New York "strict liability" case, *Walter v. Bauer*, failed in 1981.¹⁶² The case involved an injury to the eye of a child who tried an experiment, from a science textbook, using a ruler and a rubber band. In *Walter*, the plaintiff argued that the "product," a book entitled *Discovering Science 4*, was defective "because it contained an unreasonable risk of harm by placing dangerous instrumentalities or [sic] rubber bands and ruler [sic] in the hands of fourth grade students" and because the defendant failed to warn of the dangers.¹⁶³ Ruling for the defendants, the judge said the child "was not injured by use of the book for the purpose for which it was destined, i.e., to be read."¹⁶⁴ But more important, according to the judge, were the First Amendment considerations. Speaking of the possible "chilling effect" of imposing liability, the judge asked: "Would any author wish to be exposed to liability for writing on a topic which

Philippines. The Jeppesen chart did not show Mt. Kamunay, and the crew died. *Id.* at 925-26. But misuse of the chart by the crew spared Jeppesen from liability under either strict liability or misrepresentation that its charts were accurate. *Id.* at 930.

158. 494 N.Y.S.2d 974 (N.Y. 1985).

159. *Id.* at 974-75.

160. *Id.* at 975-76.

161. *Id.* at 978.

162. 439 N.Y.S.2d 821 (1981).

163. *Id.* at 822.

164. *Id.*

might result in physical injury? *e.g.*, How to cut trees; How to keep bees?"¹⁶⁵

B. The Courts' Logic Holding Publishers of Aeronautical Charts Responsible but Releasing Other Publishers from Liability Is Contradictory

A basic inconsistency in case law appears if one compares the two Jeppesen cases decided in 1985, the *Beasock v. Dioguardi Enterprises* case decided in 1985, and the *Walter v. Bauer* case decided in 1981. Jeppesen, the maker of aeronautical charts, was held strictly liable for deaths. However, if the logic in the exploding tire case, *Beasock v. Dioguardi Enterprises*, is followed, Jeppesen could not be held accountable for the air-crash deaths. The *Beasock* logic indicates that a company is only responsible for the product it places in the stream of commerce, namely its publications, and that "the publications themselves did not produce the injuries and thus cannot serve as the basis for the imposition of liability."¹⁶⁶ By this logic, Jeppesen's charts *per se* did not cause the deaths. In the Jeppesen cases, other factors, such as a hill into which a plane crashed, caused the deaths.

Nonetheless, Jeppesen profited by selling charts upon which others relied, as the California court said in the *Fluor* case, and it made sense as a policy matter to hold Jeppesen responsible for the damage it set in motion.¹⁶⁷ But the same policy would seem to apply in the *Beasock* case because TRA profited by selling information about interchanging tires and rims produced by different manufacturers. *Beasock* and the two Jeppesen cases of *Brocklesby* and *Fluor* cannot be reconciled. They present mutually exclusive, diametrically opposed views.

Jeppesen was no more negligent than the publisher of the misinformation on tire and rim compatibility. Someone has to bear the cost: Arguably, this should be the person or entity trying to profit from supplying (mis)information.

In the same vein as the *Jeppesen* cases, if a publisher is making money by selling information, or misinformation as it were, why does the law not hold the publisher responsible? The policy considerations of protecting defenseless victims and spreading the cost of

165. *Id.* at 823.

166. 494 N.Y.S.2d at 978.

167. *Fluor Corp. v. Jeppesen & Co.*, 216 Cal. Rptr. 68 (Cal. Ct. App. 1985). For coverage of *Fluor*, see *supra* notes 153-157 and accompanying text.

compensating them would apply equally in all cases.¹⁶⁸ Whether the information was for aeronautical purposes or for interchanging tires and rims seems irrelevant. Any persons relying on books purporting to provide reliable information would seem to be in the same position as pilots relying on aeronautical charts. For instance, in *Jones v. J.B. Lippincott Co.*,¹⁶⁹ the same policy considerations of protecting the nursing student who injured herself with a hydrogen peroxide enema after consulting Lippincott's textbook would apply as in the Jeppesen cases, as would the policy of spreading the cost of compensating her for her injury.¹⁷⁰

Consider carefully the unanswered question posed by the court in *Walter v. Bauer*: "Would any author wish to be exposed to liability for writing on a topic which might result in physical injury? e.g., How to cut trees; How to keep bees?"¹⁷¹ One could answer, yes, a responsible author who is confident of his or her information should be willing to face such exposure, because accepting liability would contribute to social good. Liability would help to protect innocent persons who relied on misinformation. For instance, if an ill-informed author, for monetary reasons, wrote an inaccurate book on beekeeping, thereby padding his or her pockets with money from hapless readers, that author should be held responsible for the consequences of the inaccuracies for the same policy reasons under which Jeppesen was held responsible. Say, if an ill-informed author offered a honey-gathering plan, that would lead almost inexorably to the extractor being seriously stung. The same policy considerations of protecting the innocent victim and of spreading the cost of compensating him or her for injury would apply equally well in the case of Jeppesen's charts or books on bee-keeping. Certainly, being stung by many angry bees can lead to painful, foreseeable injuries, or even death, as can crashing a plane into an uncharted hill. And having a tree fall on one likewise could lead to painful, foreseeable injuries or death.

"But for" causality is a primary issue when assigning liability to publishers. But for Jeppesen's mistake, but for the misinformation on tire and rim compatibility and on the enema, injuries could have been avoided. The dangers were all foreseeable. The same policy reasons

168. *Fluor*, 216 Cal. Rptr. at 71.

169. For coverage of *Lippincott*, see *supra* notes 142-146 and accompanying text.

170. One commentator suggests liability in those cases where the publisher has the "subjective intent that the material be relied upon." Lisa A. Powell, *Products Liability and the First Amendment: The Liability of Publishers for Failure to Warn*, 59 IND. L.J. 503, 526 (1983).

171. 439 N.Y.S.2d 821, 823 (1981).

for holding the defendants liable should apply in all these cases. Consider the principle that if a *physical* book or magazine did not cause the problem, then there shall be no liability for the (mis)information contained within. Applying this principle in *Braun v. Soldier of Fortune*, the magazine would have suffered no liability because clearly it was not the magazine that killed Braun; rather, a gun fired by thugs hired through the ad run by *Soldier of Fortune* killed him. Nor did the physical newspaper in *Hyde* cause the problem; instead, a deranged assailant armed with a sawed-off shotgun and knowledge of Hyde's name and address caused the problem. But the information in the magazine and in the newspaper in the *Soldier of Fortune* and *Hyde* cases were links in a chain of causality. The risk was foreseeable; the harm occurred; and the defendants in those two cases were found liable.

But limits to publishers' liability should exist, lest the First Amendment become a victim of a rampant social policy that tries to protect innocent victims and spread the cost of compensating them. As courts have struggled with the issue of how far to extend a publisher's liability, they have required elements besides mere publication of erroneous information that led to injury.

IV

Risky Business: Endorsements or Sponsorships

A. Lack of Endorsement Offers Protection for Media

As long as a publisher does not endorse a product, courts have not found liability, nor a duty to check for accuracy, nor a duty to warn. Furthermore, a "misrepresentation" theory has yet to prevail. A form of *caveat emptor* seems to prevail in the absence of an endorsement: Let the user of the information beware. He or she relies on the accuracy of the information at his or her own peril.

1. A Toxic-Shock Victim Lost Because of a Lack of Endorsement by a Magazine

One case was won by a defendant magazine that did not endorse products but conceded it would have been liable *if* it had. In the 1987 case of *Walter v. Seventeen Magazine*,¹⁷² a young woman sued for injuries following hospitalization for toxic shock syndrome. The

172. 241 Cal. Rptr. 101 (Cal. Ct. App. 1987).

plaintiff claimed she had relied on an ad in *Seventeen Magazine* for Playtex tampons, and sued the magazine for negligence and product liability, among other theories. She argued that *Seventeen* knew of the danger because Rely tampons, which contained the same harmful substance as Playtex tampons, had already been removed from the marketplace.¹⁷³ In its defense, the magazine argued that it had no duty to investigate products it advertises and that it was not liable for the products' defects *unless* it endorsed the products.¹⁷⁴ The appellate court agreed with *Seventeen*, saying:

[W]e are loathe to create a new tort of negligently failing to investigate the safety of an advertised product. Such a tort would require publications to maintain huge staffs scrutinizing and testing each product offered. The enormous cost of such groups, along with skyrocketing insurance rates, would deter many magazines from accepting advertising, hastening their demise from lack of revenue. Others would comply, but raise their prices beyond the reach of the average reader. Still others would be wiped out by tort judgments, never to revive. Soon the total number of publications in circulation would drop dramatically.

Perhaps this dire possibility is one reason the United States Supreme Court has been so vigilant about linking commercial speech to the First Amendment.¹⁷⁵

2. A Youth Injured by Fireworks Lost Because of a Lack of Endorsement by a Magazine

In the 1974 case of *Yuhas v. Mudge*,¹⁷⁶ a New Jersey court embraced the idea that a magazine should only face liability if it endorsed a product. In that case, a minor had been injured after an adult bought fireworks advertised in *Popular Mechanics Magazine*. The appeals court affirmed a summary judgment for the defendants, explaining the plaintiff's theory for recovery as follows: the publishers produce "a pseudo-scientific publication which has acquired an 'aura of authentativeness' in the public's mind," and thus had a duty to test "inherently dangerous products" advertised in the magazine.¹⁷⁷ The court then rejected the plaintiff's theory of liability, holding that the

173. *Id.*

174. *Id.* at 101-02.

175. *Id.* at 102-03. The *Walters* court distinguished its case from *Hanberry v. United States*, 117 S. Ct. 158 (1996). For coverage of *Hanberry*, see *infra* notes 230-236 and accompanying text.

176. 322 A.2d 824 (N.J. 1974).

177. *Id.* at 825.

magazine had no such duty unless it guaranteed, warranted, or endorsed the product.¹⁷⁸

3. *A Travel Guide's Publisher Won Because the Guide Made No Endorsement*

Similarly, in a 1992 case, *Birmingham v. Fodor's Travel Publications, Inc.*,¹⁷⁹ the Supreme Court of Hawaii emphasized a lack of guarantee in ruling for the publisher. The plaintiff sued Fodor's Travel Publications, Inc., for failure to warn about dangerous conditions at a Hawaiian beach.¹⁸⁰ Fodor's had published a travel guide, *Fodor's Hawaii 1988*, written by a travel writer rather than Fodor's. James Birmingham bought a copy of the book, and based on information it contained, he visited Kekaha Beach to body surf, where he was injured. In ruling for Fodor's, the court pointed out that the publisher had not guaranteed or endorsed the locations described in its guides.¹⁸¹ According to the court's review of case law, no court had ever held a publisher liable for negligence in a personal injury case where the plaintiff relied on published information "unless the publisher authored or guaranteed the information."¹⁸² The court concluded that absent authorship or a guarantee, Fodor's had "no duty to investigate and warn its readers of the accuracy of the contents of its publications."¹⁸³ The court also rejected the argument that Fodor's guide was a "product," thus rejecting a strict liability theory.¹⁸⁴

4. *The Publisher of a Mushroom Guide Prevailed Because it Owed No Duty to Check Accuracy*

"Failure to check accuracy" also failed as a negligence theory used against another book publisher in a 1991 case, *Winter v. G.P. Putnam's Sons*.¹⁸⁵ The publishers of *The Encyclopedia of Mushrooms* prevailed when sued by California mushroom mavens who, while referring to the encyclopedia, misidentified mushrooms as edible and became very ill as a result of eating their poisonous harvest. In a

178. *Id.* The court also said: "To impose the suggested broad legal duty upon publishers of nationally circulated magazines, newspapers and other publications, would not only be impractical and unrealistic, but would have a staggering adverse effect on the commercial world and our economic system." *Id.*

179. 833 P.2d 70 (Haw. 1992).

180. *Id.* at 73.

181. *Id.*

182. *Id.* at 75.

183. *Id.* at 76.

184. *Id.* at 77-79.

185. 938 F.2d 1033 (9th Cir. 1991); see also *supra* note 140 and accompanying text.

strong opinion, the federal appellate court rejected the argument that the publishers were negligent for not checking the accuracy of the encyclopedia.¹⁸⁶ Although a publisher may assume the burden of checking accuracy, the court held it has no duty to do so, adding: "Were we tempted to create this duty, the gentle tug of the First Amendment and the values embodied therein would remind us of the social costs."¹⁸⁷

5. *A Book Dealer Who Sold a Cookbook Prevailed Because it Made No Implied Warranty*

Similarly, a book dealer had no duty to check information. A Florida Court of Appeal found in the 1977 case of *Cardozo v. True*¹⁸⁸ that a distributor of a cookbook containing a recipe that included a poisonous plant was not liable for physical injury as there was no implied warranty. Ingrid Cardozo purchased the book *Trade Winds Cookery* from Ellie's, a retail book dealer. She followed a recipe for cooking the Dasheen plant, commonly called "elephant's ears." She ate a small slice of the uncooked plant as she worked and "immediately experienced coughing, gasping and intense stomach cramps that persisted several days, despite medical care."¹⁸⁹ The plaintiff contended the book failed to warn of danger, and "Ellie's impliedly warranted that the book was reasonably fit for its intended use."¹⁹⁰ The court agreed with the defendant's characterization of the situation: Ellie's conceded that it might be subject to the Uniform Commercial Code's doctrine of implied warranty, but claimed the warranty was limited to the physical characteristics of the books.¹⁹¹ Also, Ellie's argued that it would be impossible for book sellers to test every recipe in books they offer.¹⁹² Using a *reductio ad absurdum* argument, Ellie's claimed that stores disseminating information would need expertise in every field in which they offered books. This burden, according to Ellie's, would drive book stores out of business, ultimately encroaching on freedom of expression.¹⁹³ The court agreed:

186. *Winter*, 938 F.2d at 1035-36.

187. *Id.* at 1037; See also Note, *Ninth Circuit Holds that California's Products Liability Law Does Not Cover False Statements in a Book*, 105 HARV. L. REV. 1147 (1992).

188. 342 So. 2d 1043 (Fla. Dist. Ct. App. 1977).

189. *Id.* at 1054.

190. *Id.* at 1055.

191. *Id.*

192. *Id.*

193. *Id.*

As we have observed, books are goods. As such Ellie's is held to have impliedly warranted the tangible, physical properties; i.e., printing and binding of books. But, at this point it becomes necessary to distinguish between the tangible properties of these goods and the thoughts and ideas conveyed thereby It is unthinkable that standards imposed on the quality of goods sold by a merchant would require that merchant, who is a book seller, to evaluate the thought processes of the many authors and publishers of the hundreds and often thousands of books which the merchant offers for sale. One can readily imagine the extent of potential litigation. Is the newsdealer, or for that matter the neighborhood news carrier, liable if the local paper's recipes call for inedible ingredients? We think not.¹⁹⁴

An analogous principle is that distributors cannot be held liable for libel.¹⁹⁵ Further, libel law prohibits imposing liability without fault, whereas liability for breach of an implied warranty may occur without fault.¹⁹⁶ The theme running through libel law, the *Cardozo* court said, is this: "[I]deas hold a privileged position in our society. They are not equivalent to commercial products."¹⁹⁷

194. *Id.* at 1056. Jonathan B. Mintz argues for strict liability. See Jonathan B. Mintz, *Strict Liability for Commercial Intellect*, 41 CATH. U.L. REV. 617 (1992). As he says:

Courts have almost uniformly refused to classify written words or an idea as a "product" for purposes of imposing the various form of products liability. By creating artificial distinctions between the intellectual or intangible component of a product, such as a recipe in a cookbook . . . , and the product's tangible characteristics, courts have often left plaintiffs without any redress, whether the claims sounded in negligence, warranty, or strict liability.

Id. at 617. Mintz calls "unprincipled" the distinction which says publishers should face liability for paper cuts from a cookbook but not for the consumption of one of the ingredients in one of its recipes. *Id.* at 618. Therefore, Mintz proposes the creation of a "commercial intellect products liability doctrine" to permit courts to impose strict liability "where the intellectual aspects of a product introduced into the stream of commerce proximately cause physical injury." *Id.* at 619. But he does admit that a publisher's "duty to investigate" would be "the most troubling First Amendment incursion of commercial intellect products liability." *Id.* at 638.

Mintz does manage to give entertaining examples of what would constitute a product. For instance, he talks of Derek Humphrey's book, *Final Exit* (1991), as being a product when it provides "detailed instructions" on how to commit suicide. (Could a surviving plaintiff really sue because he or she did not die?) Mintz also discusses Tracy Cabot's Book, *How to Make a Man Fall in Love with You: The Fail Proof, Fool Proof Method* (1984): "If the book merely gives advice and suggestions (e.g., 'talk about sports and wear lots of makeup'), rather than a blueprint, it would most likely not be categorized as a product by a court." *Id.* at 646. A science textbook which proposes experiments, however, would be considered a product. *Id.* at 646. See also *Strict Liability for the Dissemination of Dangerous Information?* 82 L. LIBR. J. 497 (1990).

195. *Cardozo*, 342 So. 2d at 1056.

196. *Id.*

197. *Id.* at 1057.

6. *The Publisher of a Metalsmith Book Prevailed Because it Owed No Duty to Warn*

"Failure to warn" also failed as a cause of action in a 1987 Michigan case, *Lewin v. McCreight*.¹⁹⁸ The plaintiffs had concocted a mordant by following instructions in *The Complete Metalsmith*.¹⁹⁹ The mordant exploded.²⁰⁰ The plaintiffs said the defendant failed to warn of "defective ideas" in the book.²⁰¹ The court, however, ruled that to prevail on a theory of failure to warn, the plaintiffs would first have to show that the defendant had a duty to warn.²⁰² In this case, the court reasoned that "the defendant publisher merely printed and bound a book, the contents of which were written by a third-party author."²⁰³ The Michigan court then adopted the rule of the Illinois Appellate Court in a 1985 case, *Alm v. Van Nostrand Reinhold Co.*²⁰⁴ The *Alm* rule is that publishers have no duty to warn because the "burden" of scrutinizing information supplied by third-party authors would be too burdensome and the number of potential plaintiffs too great.²⁰⁵

This Court agrees with the court in *Alm* that given the tremendous burden such a duty would place upon defendant publishers, the weighty societal interest in free access to ideas, and potentially unlimited liability, it would be unwise to impose a duty to warn of "defective ideas" upon publishers of information supplied by third party authors.²⁰⁶

7. *The Publisher of a Tool-Making Book Prevailed Because it Owed No Duty to Warn*

The *Alm* case involved another "how to" book, *The Making of Tools*.²⁰⁷ A tool shattered and injured a man while he was following the book's instructions.²⁰⁸ The man sued, claiming the publisher had a duty to provide both adequate instructions and warnings of the

198. 655 F. Supp. 282 (E.D. Mich. 1987).

199. *Id.* at 282.

200. *Id.*

201. *Id.* at 283.

202. *Id.*

203. *Id.*

204. 480 N.E.2d 1263 (Ill. App. Ct. 1985).

205. *Lewin*, 655 F. Supp. at 283-84.

206. *Id.* at 284. The opinion continued, "Because the Court decides this case on the basis of state tort law, it does not reach the issue of whether the imposition of a duty to warn upon publishers of 'How To' books would pass muster under the first amendment." *Id.*

207. *Alm*, 480 N.E.2d at 1264.

208. *Id.*

dangers of toolmaking. He urged the court to adopt section 311 of the *Restatement (Second) of Torts*, which imposes a duty to provide adequate instructions.²⁰⁹ The court cited Prosser on the importance of recognizing that imposing a duty constitutes "judicial policy-making."²¹⁰ Foreseeability is insufficient for liability, the court stressed, because almost every harm seems "foreseeable" in retrospect. Instead, the *Alm* court said, courts should consider the likelihood that injury will occur, the difficulty of guarding against injury, and the consequences of burdening the defendant with liability.²¹¹

8. *A Newspaper That Published a Dandruff Remedy Prevailed Over "Negligent Misrepresentation" Charges*

Considerations similar to those in *Alm* resulted in rejection of liability for a newspaper in an earlier case, *MacKown v. Illinois Publishing & Printing Co.*²¹² In that case, a reader had been injured by using a dandruff remedy published by the newspaper. The article said the "formula," which included mercury, should be filled by a pharmacist and that it was "reliable" and "scientific" because it came from a "reputable physician."²¹³ As a matter of policy, the *MacKown*

209. The *Restatement (Second) of Torts*, section 311 (1965), reads:

(1) One who negligently gives false information to another is subject to liability for physical harm caused by action taken by the other in reasonable reliance upon such information, where such harm results

(a) to the other, or

(b) to such third person as the actor should expect to be put in peril by the action taken.

(2) Such negligence may consist of failure to exercise reasonable care

(a) in ascertaining the accuracy of the information, or

(b) in the manner in which it is communicated.

For a general article on "reliance," see Daniel McNeel Lane, Jr., Note, *Publisher Liability for Material that Invites Reliance*, 66 TEX. L. REV. 1155 (1988). For other general articles on negligence, see, for example, Frederick Schauer, *Uncoupling Free Speech*, 92 COLUM. L. REV. 1321 (1992); Alan Stephens, *First Amendment Guaranty of Freedom of Speech or Press as Defense to Liability Stemming from Speech Allegedly Causing Bodily Injury*, 94 A.L.R. FED. 26 (1991); Gerald R. Smith, Note, *Media Liability for Physical Injury Resulting from the Negligent Use of Words*, 82 L. LIBR. J. 497 (1990).

210. *Alm*, 480 N.E.2d at 1264-65 (quoting W. PROSSER, LAW OF TORTS § 53, at 325-26 (4th ed. 1971)).

211. *Alm*, 480 N.E.2d at 1265.

212. 6 N.E.2d 526 (Ill. App. Ct. 1937).

213. *Id.* at 527. Commenting on the *MacKown* case, one commentator observes:

If a manufacturer sells a hair tonic injurious to humans, an injured consumer has a potential cause of action. If a publisher publishes the formula for that same hair tonic, an injured reader has no means of legal redress. What justifies this apparent anomaly?

court held that the newspaper owed no duty to the reader.²¹⁴ In adopting the *MacKown* ruling and rejecting what it called "negligent misrepresentation," the *Alm* court said that recognizing negligent misrepresentation would impose upon publishers a duty to test every procedure contained in their publications.²¹⁵

The *Alm* case, unlike *Lewin*, addresses First Amendment issues. The court explained in *Alm*:

Plaintiff argues that the first amendment should not shield defendant from liability, and attempts to distinguish bad advice in a "How To" book from "a treatise on politics, religion, philosophy, interpersonal relationships, or the like." We suspect that such a distinction would lead to further first amendment problems involving content-based discrimination. More important for our purposes, however, is the chilling effect which liability would have upon publishers, an effect recognized in the cases and not denied by plaintiff. Even if liability could be imposed consistently with the Constitution, we believe that the adverse effect of such liability upon the public's free access to ideas would be too high a price to pay.²¹⁶

The notion that ideas hold a 'preferred position' in our society is an inevitable response to that question. But that answer only begs the question.

Powell, *supra* note 170, at 503 (footnotes and citations omitted).

214. *MacKown*, 6 N.E.2d at 530.

215. 480 N.E.2d at 1267.

216. *Id.* at 1267 (citation omitted). In 1981, Barbara Libertelli sued the manufacturer of Valium and the publisher of *Physicians Desk Reference (PDR)*. She sued *PDR*'s publisher for "gross negligence" because of failure to warn that Valium is addictive. The publisher published information about Valium that the manufacturer provided without independently testing Valium. See *Libertelli v. Hoffman-La Roche, Inc.*, No. 80 Civ. 5626, slip op. (S.D.N.Y. Feb. 23, 1981). In granting the publisher's motion to dismiss the case, the United States District Court for the Southern District of New York said that the First Amendment prohibited Libertelli's claim regardless of whether the *PDR* piece on Valium were characterized as an advertisement or an informational article because the same standard applied.

The Libertelli court used the "actual malice" standard of the libel and false light cases of *New York Times v. Sullivan*, 376 U.S. 254 (1964), and *Time, Inc. v. Hill*, 385 U.S. 374 (1966), saying that "a publisher is not liable for false reports of matters of public interest absent knowledge of falsity or reckless disregard of the truth." The court then commented that "[i]nformation about medical matters is sufficiently important to the public interest to warrant application of that standard here." Libertelli did not allege that the publisher either knew of Valium's addictive character or published with reckless disregard of the truth. *Libertelli*, slip op. Note that in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the Court rejected the view that the First Amendment required private plaintiffs caught up in matters of public interest to prove actual malice; instead, states would set the standards for private individuals, so long as the states required "fault." *Id.* at 345-46.

9. *A Publisher of an Encyclopedia on Chemicals Likewise Prevailed Over "Misrepresentation" Charges*

Like the court in *Lewin*, a New York court rejected "misrepresentation" as a theory of liability. The 1977 case of *Demuth Development Corp. v. Merck & Co., Inc.*,²¹⁷ involved the publisher of an encyclopedia of chemicals. The encyclopedia apparently misrepresented the toxicity of a chemical, triethylene glycol, that the plaintiff used in its air sterilization appliance, the Demuth Glycol Vaporizer.²¹⁸ Hospitals used the vaporizer.²¹⁹ The listing for "triethylene glycol" read, "Human Toxicity: See Ethylene Glycol." The "ethylene glycol" listing called it a "hazard" and listed a host of horrors which the chemical could cause. But triethylene glycol is apparently totally non-toxic if inhaled as a vapor. Nonetheless, many of the plaintiff's customers used the encyclopedia, considering it a reliable authority, and stopped using the vaporizers.²²⁰ A later edition of the encyclopedia made clear that triethylene glycol could be used in "air disinfection."²²¹ The court concluded that Merck did not owe "any duty" to the plaintiff concerning the information about triethylene glycol.²²² The court pointed to the First Amendment:

Plaintiff . . . could not claim it relied to its detriment on misinformation published by Merck. Nor does plaintiff point to any "relationship of the parties, arising out of contract or otherwise," which "in morals or good conscience" placed Merck under any duty towards plaintiff or its business. On the contrary, Merck's right to publish free of fear of liability is guaranteed by the First Amendment and the overriding societal interest in the untrammelled dissemination of knowledge. The right is circumscribed only by laws such as those respecting national secrets, copyright, obscenity, defamation and unfair competition. The court has already held that no claim for defamation is stated and plaintiff does not rely on any grounds other than negligence and willful misrepresentation.²²³

217. 432 F. Supp. 990 (E.D.N.Y. 1977).

218. *Id.* at 991.

219. *Id.*

220. *Id.* at 992.

221. *Id.* at 992 n.2.

222. *Id.* at 992-93.

223. *Id.* at 993 (internal citation omitted). The court also pointed to Prosser:

As one noted commentator points out, where misstatements are claimed to be the cause of loss, even a "reasonable anticipation that the statement will be communicated to others whose identity is unknown to the defendant, or even knowledge that the

Merck's position was bolstered by the fact that it had been publishing its misinformation about triethylene glycol for 14 years before the plaintiff complained.²²⁴

10. A Movie Producer Prevailed Over "Failure to Protect" Charges

Negligence theory also includes "failure to protect," which proved unsuccessful in the 1982 case of *Bill v. Superior Court of the City and County of San Francisco*.²²⁵ In *Bill*, the mother of a girl who was shot outside a movie theater in California sued the movie's producer on behalf of her daughter, arguing that the film *Boulevard Nights* attracted persons who were "predisposed to violence."²²⁶ Because the defendants knew the film would attract such persons, the plaintiff's argument continued, the defendants had a "duty to warn and/or provide protection."²²⁷ But the court reasoned that "activity in producing a motion picture and arranging for its distribution, is socially unobjectionable—and in light of First Amendment considerations, must be deemed so even if it had the tendency to attract violence-prone individuals to the vicinity of theaters at which it was exhibited."²²⁸ In a similar case, a woman injured by a blow to the nose at an Aerosmith concert unsuccessfully sued the musicians and the concert's organizers.²²⁹

B. Courts Generally Find Liability in Those Cases Where Injury Results From an Endorsed Product or Sponsored Event

In the 1969 case of *Hanberry v. Hearst Corp.*,²³⁰ the plaintiff, Zayda Hanberry, won because a product advertised in *Good Housekeeping Magazine* carried the "Good Housekeeping's Consumers' Guaranty Seal."²³¹ The seal on the purchased shoes bore the promise that "If the product or performance is defective, Good

recipient intends to make some commercial use of it in dealing with unspecified third parties, is not sufficient to create a duty of care towards them.

Id. (citing W. PROSSER, LAW OF TORTS 708 (4th ed. 1971)).

224. *Id.* at 994.

225. 187 Cal. Rptr. 625, 626 (Cal. Ct. App. 1982).

226. *Id.* at 628.

227. *Id.*

228. *Id.* at 631.

229. *Matarazzo v. Aerosmith Prod., Inc.*, No. 86 Civ. 8815 (S.D.N.Y. filed Nov. 16, 1989). For more on suits against musicians, see *infra* notes 310-355 and accompanying text.

230. 81 Cal. Rptr. 519 (Cal. Ct. App. 1969).

231. *Id.* at 521.

Housekeeping guarantees replacement or refund to consumer.”²³² Further, the magazine said, “We satisfy ourselves that products advertised in *Good Housekeeping* are good ones and that the advertising claims made for them in our magazine are truthful.”²³³ Not only did the seal of endorsement appear in *Good Housekeeping*, but Hearst also allowed products bearing the seal to state that fact in ads in other publications and allowed the seal to be attached to those products.²³⁴ The *Good Housekeeping* seal, in effect, sealed the publisher’s fate when, while wearing the endorsed shoes, Hanberry slipped on her kitchen floor. She then sued the Hearst Corporation, among others.²³⁵

The California appellate court allowed Hanberry to sue on the theory of “negligent misrepresentation,” stating:

The basic question presented on this appeal is whether one who endorses a product for his [or her] own economic gain, and for the purpose of encouraging and inducing the public to buy it, may be liable to a purchaser who, relying on the endorsement, buys the product and is injured because it is defective and not as represented in the endorsement. We conclude such liability may exist and a cause of action has been pleaded in the instant case.²³⁶

1. A Radio Broadcaster’s Co-Sponsorship of Cheap Drinks at a Bar Led to Liability for a Drunken-Driving Accident

According to a 1994 case, a radio broadcaster’s co-sponsorship of “Ladies Night” at a bar is, in terms of liability, an equivalent to a magazine’s endorsement of an ad. The case of *Riley v. Triplex Communications, Inc.*,²³⁷ began when when two police officers, the plaintiffs, were struck by a drunk in a rather bizarre chain of events. On Thursday nights, the Cowboy Palace bar and Radio Station KZZB-95 FM in Beaumont, Texas, sponsored “B-95 Ladies’ Night at the Palace,” when drinks were only 95 cents each and women paid no cover charge.²³⁸ One Thursday night, an underaged drinker, who had consumed approximately ten drinks, had an accident on his way home. The officers were directing traffic around the accident when another

232. *Id.*

233. *Id.*

234. *Id.* at 522.

235. *Id.* at 521.

236. *Id.* The court cited *Restatement (Second) of Torts*, section 311. *Id.* at 523 n.1. For the text of section 311, see *supra* note 209.

237. 874 S.W.2d 333 (Tex. App. 1994).

238. *Id.* at 335-36.

drunk, who had consumed sixteen or seventeen rum-and-cokes and was speeding home from the Palace, struck the officers with his car. The officers sued both the Palace and the radio station.²³⁹ The trial jury awarded one officer \$1,300,139.57 and the other \$91,714.85, ruling against the Palace on the dram shop theory of liability.²⁴⁰ But the judge refused to let the jury decide the questions of whether the Palace and the radio station were a "joint enterprise" and whether the radio station engaged in "negligent promotion."²⁴¹

The appeals court noted that the radio station approached the Palace with the idea of a B-95 night.²⁴² Promotions included giving away free t-shirts and beer mugs advertising both the radio station and the Palace as well as giving away cars during a B-95 night.²⁴³ The radio station broadcast live from the Palace on B-95 nights and the president of KZZB-95 acknowledged that the live broadcast could easily lead listeners to believe a B-95 event was under way.²⁴⁴ The appeals court concluded that "[i]t would be difficult to conjure a more appropriate factual scenario to which the legal concept . . . of joint enterprise would apply."²⁴⁵ In fact, the court said, "In advertising or promoting, seldom is seen such co-mingling, intertwining and common pursuit of purpose."²⁴⁶

The court characterized the advertising as negligent promotion because the perception of B-95 night was that it was a "party" with B-95 as the host.²⁴⁷ The radio station's "promotional activities" were geared to induce patrons "to purchase and consume as many alcoholic beverages as time would permit" whether they were old enough to legally drink or not.²⁴⁸ The court adopted the view that it would consider several factors, including "risk, foreseeability, and likelihood of injury," and weigh them against "the social utility of the actor's conduct, the magnitude of the burden of guarding against the injury,

239. *Id.* at 335.

240. *Id.* at 335-36.

241. *Id.*

242. *Id.* 336.

243. *Id.* at 336-37.

244. *Id.* at 338-39.

245. *Id.* at 346.

246. *Id.* at 349.

247. *Id.* at 339.

248. *Id.* at 350. The court case includes transcriptions of several B-95 promotions. *Id.* at 338-39.

and consequences of placing the burden on the defendant.”²⁴⁹ Foreseeability, however, was the court’s “foremost and dominant consideration.”²⁵⁰ The court concluded that it was reasonably foreseeable that patrons would respond to the promotional bombardment, drink irresponsibly, leave the Palace in a car, and have an accident.²⁵¹ To determine whether the risks were reasonable, the court weighed them against the social utility of the radio station’s conduct by asking a rhetorical question: “Does there exist any redeemable social utility in advertisement which encourages irresponsible drinking via inexpensive alcoholic beverages whether those persons are of legal age or not?”²⁵² As precedent for ruling against the radio station, the court cited *Braun v. Soldier of Fortune Magazine*.²⁵³ The court remanded the case, saying that the trial court erred in refusing to let the jury decide the questions of joint enterprise and negligent promotion.²⁵⁴

2. *A Radio Broadcaster’s Sponsorship of a Contest Requiring Speed on the Road Led to Liability for a Driving Accident*

A rock station’s sponsorship of a dangerous activity also resulted in a plaintiff’s victory in the 1975 case of *Weirum v. RKO General, Inc.*²⁵⁵ Radio station KHJ in Los Angeles, which at the time had 48 percent of the teenage audience in the Los Angeles area, offered a reward to the first listener to locate a disk jockey in a “conspicuous” red car and answer a question he posed.²⁵⁶ The disc jockey kept listeners apprised of his route. While two minors in separate cars pursued the disc jockey, one of the pursuers ran another motorist off the road, killing him. The dead man’s wife and children sued the station.²⁵⁷ The court asked whether the radio station had owed the

249. *Id.* at 350.

250. *Id.* at 350 (quoting *Greater Houston Transp. Co. v. Phillips*, 801 S.W.2d 523, 525 (Tex. 1990)). For a nearly verbatim recitation of the same requirements, see *Way v. Boy Scouts of America*, 856 S.W.2d 230 (Tex. App. 1993), discussed *supra* notes 130-135 and accompanying text.

251. *Riley*, 874 S.W. 2d at 350.

252. *Id.* at 351.

253. *Id.* For its similarity and reasoning, the court also cited *Weirum v. RKO General, Inc.*, 539 P.2d 36 (Cal. 1975). For a full discussion of *Weirum*, see *infra* notes 255-262 and accompanying text.

254. *Riley v. Triplex Communications, Inc.*, 874 S.W.2d 333, 353 (Tex. App. 1994).

255. 539 P.2d 36 (Cal. 1975).

256. *Id.* at 37-38.

257. *Id.* at 38-39.

victim "a duty of due care."²⁵⁸ The court said that "foreseeability of the risk is a primary consideration in establishing the element of duty."²⁵⁹ The court concluded that evidence of foreseeability was ample and that "[i]t is of no consequence that the harm . . . was inflicted by third parties acting negligently."²⁶⁰ The court also rejected the defendant's argument that the contest received First Amendment protection, saying, "The issue here is civil accountability for the foreseeable results of a broadcast which created an undue risk of harm The First Amendment does not sanction the infliction of physical injury merely because achieved by word, rather than act."²⁶¹

Echoing the rhetorical question asked in *Riley* of whether the social utility of the radio station's activities outweighs the risks of drunk driving, the court in *Weirum* asked whether the social utility outweighed the risks caused by high-speed automobile chases. After weighing the factors, the court decided that "neither the entertainment afforded by the contest nor its commercial rewards can justify the creation of such a grave risk."²⁶²

V

Incitement

A. The *Brandenburg* Incitement Theory

Negligence and strict liability are not the only theories used against the media to find liability for the infliction of bodily harm or death on others. Plaintiffs also have employed the incitement theory found in *Brandenburg v. Ohio*.²⁶³ In this 1969 case, a Ku Klux Klan leader was convicted of violating a state statute prohibiting advocacy of "the duty, necessity, or propriety of crime, sabotage, violence or unlawful methods of terrorism as a means of accomplishing industrial

258. *Id.* at 39.

259. *Id.* at 39 (citation omitted). The court also said, "It is true, of course, that virtually every act involves some conceivable danger. Liability is imposed only if the risk of harm resulting from the act is deemed unreasonable—i.e., if the gravity and likelihood of the danger outweigh the utility of the conduct involved." *Id.* at 40 (citing W. PROSSER, LAW OF TORTS 146-49 (4th ed. 1971)).

260. *Weirum*, 539 P.2d at 40 (citation omitted).

261. *Id.*

262. *Id.*

263. 395 U.S. 444 (1969).

or political reform.”²⁶⁴ The Court enunciated the test to be used in determining whether advocacy language could be proscribed:

[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless actions and is likely to incite or produce such action.²⁶⁵

This test can be viewed as having two parts, with a *subjective* requirement that advocacy be “directed to inciting or producing imminent lawless actions” and an *objective* requirement that the advocacy be “likely to incite or produce such action.” Or the *Brandenburg* test can be viewed as having three parts, requiring (1) intent, (2) imminence, and (3) likelihood. Either way, the “incitement” standard under *Brandenburg* is an extremely difficult one to satisfy. As the United States Court of Appeals for the Sixth Circuit observed, “without actual incitement, First Amendment considerations ‘argue against . . . liability’”²⁶⁶

As the following cases demonstrate, courts have emphatically rejected liability in bodily injury cases in which plaintiffs have attempted to invoke “incitement.”²⁶⁷

264. *Id.* at 444-45. The proscription of “unlawful methods of terrorism” of course raises the question of whether there are *lawful* methods of terrorism.

265. *Id.* at 447.

266. *Watters v. TSR, Inc.*, 904 F.2d 378, 382 (6th Cir. 1990)(citations omitted). Although philosopher John Stuart Mill was a staunch supporter of everyone’s right to express an opinion, he wrote in his famous work *On Liberty*: “[E]ven opinions lose immunity, when the circumstances in which they are expressed are such as to constitute . . . a positive instigation to some mischievous act.” He then gives an example of what he means by an opinion which is “a positive instigation to some mischievous act”: “An opinion that corn-dealers are starvers of the poor . . . ought to be unmolested when simply circulated through the press, but may justly incur punishment when delivered orally to an excited mob assembled before the house of a corn-dealer” JOHN STUART MILL, *ON LIBERTY*, PART III, in *ESSENTIAL WORKS OF JOHN STUART MILL* 304 (Max Lerner ed., 1961).

Whipping up an excited mob led to a conviction for “inciting to riot” in *New York v. Tolia*, 631 N.Y.S.2d 632, 633-34. (1995). Police were about to shut off the power to a band playing at the end of a four-day “Resist to Exist Concert” in Manhattan when the defendant told the crowd to “Resist.” They did, surging forward to the stage and injuring police. *Id.* at 633-34. Clearly his speech “was calculated to incite and produce imminent lawless action,” the Appellate Division of the Supreme Court of New York ruled. *Id.* at 637.

267. For an interesting article that explores incitement cases decided through early 1987, see Juliet Lushbough Dee, *Media Accountability for Real-Life Violence: A Case of Negligence or Free Speech?*, 37 J. OF COMM. 106 (Spring 1987). In summarizing her article, Dee says, “A review of the U.S. court decisions on cases in which a child or young adult was the victim of violence that was said to have been induced by the media—from films to television to rock music—suggests that the courts have in general hesitated to hold media organizations accountable for inciting the violent acts of individuals.” See also David Crump, *Camouflaged Incitement: Freedom of Speech*,

B. Modern Incitement Case Law

1. A Magazine Publisher Prevailed

A fourteen-year-old boy tried an experiment—"autoerotic asphyxia"—as discussed in *Hustler* magazine in an article entitled *Orgasm of Death*. He died. A copy of *Hustler*, opened to the article, lay on the closet floor where his nude body hung. His parents sued but lost in the 1987 case of *Herceg v. Hustler Magazine*.²⁶⁸

The United States Court of Appeals for the Fifth Circuit described autoerotic asphyxia as "masturbation while 'hanging' oneself in order to temporarily cut off the blood supply to the brain at the moment of orgasm."²⁶⁹ The *Hustler* article described how to perform the maneuver and the pleasure one might receive, but warned: "*Hustler* emphasizes the often-fatal dangers of the practice of 'auto-erotic asphyxia,' and recommends that readers seeking unique forms of sexual release DO NOT ATTEMPT this method. The facts are presented here solely for an educational purpose."²⁷⁰ The court rejected the argument that the article constituted an "incitement to attempt a potentially fatal act," holding that imposing liability would impermissibly infringe on *Hustler's* freedom of speech.²⁷¹ In the court's words, "Even if the article paints in glowing terms the pleasures supposedly achieved by the practice it describes . . . no fair reading of it can make its content advocacy, let alone incitement to engage in the practice."²⁷²

2. A Book Publisher Prevailed

The incitement theory also failed in a 1979 Pennsylvania case, *Smith v. Linn*.²⁷³ A woman died of cardiac arrest after losing more than 100 pounds while following a liquid protein diet from *When Everything Else Fails . . . The Last Chance Diet*.²⁷⁴ The administrator of her estate sued the publisher, alleging that the woman's death was

Communicative Torts, and the Borderland of the Brandenburg Test, 29 GA. L. REV. 1 (1994); Ilene R. Penn, *Right or Privilege: Indecent, Inciteful and Hateful Speech?* 1 COMM'LAW CONCEPTUS 126 (1993).

268. 814 F.2d 1017, 1018-19 (5th Cir. 1987).

269. *Id.* at 1018.

270. *Id.* at 1018-19 (Part I).

271. *Id.* at 1021.

272. *Id.* at 1022-23.

273. 563 A.2d 123 (Pa. 1989).

274. *Id.* at 123.

caused by her adherence to the diet.²⁷⁵ The plaintiff argued that the book should not be granted First Amendment protection because it was an "incitement to immediate unreflecting action such as the action arising from shouting 'Fire!' in a crowded theater."²⁷⁶ In short, according to the court, the plaintiff wanted the court to be the first to find a publisher liable for negligent publication of a book.²⁷⁷ The court declined to do so, even though it was "moved by the grievous circumstances."²⁷⁸

3. *The Manufacturer of the Parlor Game "Dungeons & Dragons" Prevailed*

Claiming that "Dungeons & Dragons" so obsessed her son that he committed suicide, a mother sued for wrongful death but lost in the 1991 *Watters v. TSR, Inc.*²⁷⁹ case. The United States Court of Appeals for the Sixth Circuit rejected the incitement theory, concluding that the boy's "death surely was not the fault of his mother, or his school, or his friends, or the manufacturer of the game he and his friends so loved to play. Tragedies such as this simply defy rational explanation, and courts should not pretend otherwise."²⁸⁰

275. *Id.* at 124-25.

276. *Id.* at 125.

277. *Id.*

278. *Id.* at 127. The court said,

[W]ithout scrupulous protection of the first amendment right by the courts, governments can oppress the people and in effect rewrite history when the people are suppressed in their expressions, as witnessed by recent events in China. Although we are moved by the grievous circumstances surrounding the instant case, we will not disturb the proper ruling of the trial court in granting summary judgment on the basis of the first amendment right of the publisher.

Id.

279. 904 F.2d 378 (6th Cir. 1991).

280. *Id.* at 384. The court also rejected a negligence theory, saying that the contents of the game would not have given its manufacturer "reason to foresee that players of the game would become more susceptible to murder or suicide than non-players." *Id.* at 382.

In another "Dungeons & Dragons" case, Caleb Fairley, who allegedly liked to live in a "fantasy world" and play the "kingpin" from the game, was convicted of murdering a woman and her daughter. Frank Devil, *Fairley Gets Two Life Terms, No Parole*, MORNING CALL (Allentown), July 25, 1996, at A1. No suit has been filed against the manufacturers of "Dungeons & Dragons" in these deaths.

C. Television Programming Has Resulted in Unsuccessful Suits

1. Television Broadcasters Prevailed

In the 1971 case of *Zamora v. Columbia Broadcasting System*,²⁸¹ the United States District Court for the Southern District of Florida ruled against a teenage boy and his parents who claimed that the youth had become "involuntarily addicted" to and "completely subliminally intoxicated" by television.²⁸² The plaintiffs alleged that extensive viewing of television led the teenager to shoot and kill his 83-year-old neighbor.²⁸³ The plaintiffs sued CBS, ABC, and NBC, claiming the networks breached "their duty to plaintiffs by failing to use ordinary care to prevent Ronny Zamora from being 'impermissibly stimulated, incited and instigated' to duplicate the atrocities he viewed on television."²⁸⁴ The judge said that "[r]eference to the 'incitement' cases . . . should not obscure the obvious."²⁸⁵ The "obvious" was that the plaintiff should lose on First Amendment grounds, and the judge dismissed it with prejudice.²⁸⁶ He also commented:

At the risk of overdeveloping the apparent, I suggest that the liability sought for by plaintiffs would place broadcasters in jeopardy for televising *Hamlet*, *Julius Caesar*, *Grimm's Fairy Tales*; more contemporary offerings such as *All Quiet On the Western Front*, and even *The Holocaust*, and indeed would render John Wayne a risk not acceptable to any but the boldest broadcasters.²⁸⁷

281. 480 F. Supp. 199 (S.D. Fla. 1979).

282. *Id.* at 200.

283. *Id.*

284. *Id.*

285. *Id.* at 206.

286. *Id.* at 206-07.

287. *Id.* at 206. Two commentators argue the other side. For an article contending that Congress or the Federal Communications Commission should "restrict the airing of programming containing elements proven to be highly likely to cause imitative and harmful responses by viewers," see E. Barrett Prettyman, Jr. & Lisa A. Hook, *The Control of Media Related Imitative Violence*, 38 FED. COMM. L.J. 317, 318 (1987). They argue, perhaps unconvincingly to First Amendment aficionados, that:

When someone watches a brutal act on a movie or television screen and promptly carries out a similar act, hurting himself or others, our common sense tells us there must be a "but for" relationship between what this person saw and what he did. If there is, does it not follow that there must be a remedy against those who "made" him do what he otherwise would not have done?

Id. Of course, the rub is in who "made" the person do it.

2. A Television Station Prevailed

In 1982, the Supreme Court of Rhode Island also found the First Amendment barred suit against a television station that broadcast a "Johnny Carson Show" featuring a stuntman who "hanged" Carson.²⁸⁸ After the show ended, a mother found her son dead, a noose around his neck.²⁸⁹ The ensuing suit, *DeFilippo v. National Broadcasting Co.*,²⁹⁰ failed to convince the court that the broadcasters were negligent²⁹¹ or that the "Johnny Carson Show" segment was an "incitement to immediately harmful conduct."²⁹²

3. Walt Disney Productions Prevailed

Likewise, in the 1981 case of *Walt Disney Productions, Inc. v. Shannon*,²⁹³ the First Amendment was held to bar a suit brought on behalf of a child who watched the "Mickey Mouse Club" and then partially blinded himself.²⁹⁴ The show contained a feature about sound effects, including how to put a BB pellet inside a balloon and then roll the pellet around to sound as if a tire were coming off a car. The child instead put a large piece of lead in the balloon, which burst and propelled the lead into his eye.²⁹⁵ The Georgia Supreme Court rejected the plaintiff's argument that "statements made during the course of the program constituted an invitation, accepted by the plaintiff, to do something posing a foreseeable risk of injury to children of tender years."²⁹⁶ However, the court did say that it could "envision" cases where an individual could be found liable "solely on the ground" that statements did constitute such an invitation.²⁹⁷

D. TV Ads Have Resulted in Unsuccessful Suits

Pepsico was not held liable for the injuries done when a youngster imitated a stunt featured in one of its Mountain Dew commercials. In

288. *DeFilippo v. National Broad. Co.*, 446 A.2d 1036, 1037-38 (R.I. 1982).

289. *Id.* at 1038.

290. 446 A.2d 1036 (R.I. 1982).

291. *Id.* at 1040.

292. *Id.* at 1040-42.

293. 276 S.E.2d 580 (Ga. 1981). For commentary on the *DeFilippo* and *Walt Disney Production* cases, see Steven J. Weingarten, Note, *Tort Liability for Nonlibelous Negligent Statements: First Amendment Consideration*, 93 YALE L.J. 744 (1984).

294. 276 S.E.2d at 581.

295. *Id.*

296. *Id.*

297. *Id.*

the 1989 case of *Sakon v. Pepsico, Inc.*,²⁹⁸ the Florida Supreme Court said Pepsico did not encourage viewers to undertake "Lake Jumping"—riding a bicycle up a ramp and landing in water.²⁹⁹ Sakon, a 14-year-old boy, rode up a ramp and landed head-first in a creek that was only three feet deep, breaking his neck.³⁰⁰ In ruling against liability, the court said that all Pepsico did was "portray young people engaged in a sporting activity which can be dangerous if not done by skilled persons under proper conditions."³⁰¹ Liability could only be established, the court continued, if Pepsico's actions were the proximate cause of Sakon's injuries—"that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred."³⁰² But in this case, the court rejected the notion that the accident was a "foreseeable consequence."³⁰³ It also rejected the claim that the commercial should have included a warning. The court asked:

What warning would really suffice in order to avoid liability? For instance, should it specify the depth of the water? If too shallow, the actor might strike the bottom. If too deep, he might drown. Must the actor be warned he must be able to swim? Must he be warned how to prevent the bicycle from injuring him? The court should not undertake to identify or set the standards to be followed by commercials of this nature.³⁰⁴

298. 553 So. 2d 163 (Fla. 1989). The United States Court of Appeals for the Eleventh Circuit certified the question: "Whether the law of the State of Florida recognizes a duty owed by a television advertiser to its targeted audience of young viewers when that advertiser has broadcast, without adequate warnings, a commercial depicting a dangerous activity in a manner likely to induce a young viewer to imitate the activity." *Id.* at 164.

299. *Id.* at 166.

300. *Id.* at 164.

301. *Id.* at 166.

302. *Id.* at 166-67 (citation omitted). For an enlightening general article on proximate causation, see David A. Fischer, *Products Liability—Proximate Cause, Intervening Cause, and Duty*, 52 Mo. L. Rev. 547 (1987).

303. *Sakon*, 553 So. 2d at 166.

304. *Id.* at 167. The court continued:

The foreseeability of plaintiff's action was no more real than would be the foreseeability that persons attending the circus would undertake performance of acts done by the entertainers, whether on high wires, playing with animals or swallowing a sword. Should the operator of a ski area, when advertising and showing persons skiing, be required to warn viewers or readers they need to take lessons before trying to ski? Should advertisement of water ski areas warn that water skiing is dangerous, and that one should not attempt to ski over a ramp? To be sure, there is danger of injury in these sports by one inexperienced, but does the failure to warn in the advertisement constitute a breach of duty to one who observes it?

Id.

E. Movie Producers Have Also Been Unsuccessfully Sued for Incitement

In 1981, a California suit, *Olivia N. v. NBC*,³⁰⁵ stemmed from a copy-cat sexual assault. The film *Born Innocent* included a scene where an adolescent girl was sexually assaulted in a shower by four other girls using a "plumber's helper." After seeing and discussing the film, young assailants "artificially raped" a 9-year-old victim on a beach with a bottle.³⁰⁶ After an earlier attempt to show incitement,³⁰⁷ the plaintiff conceded an inability to prove "incitement as defined in *Brandenburg v. Ohio*," but claimed that negligence liability could still be imposed.³⁰⁸ The California Court of Appeals concluded that "[i]mposing liability on a simple negligence theory here would frustrate vital freedom of speech guarantees" and dismissed the case.³⁰⁹

F. Rock Stars and Their Record Companies Have Prevailed in Suits Claiming That Their Music Led to Suicides

1. Development of Case Law

In the 1991 case of *Waller v. Osbourne*,³¹⁰ parents whose son committed suicide in Georgia sued rock star Ozzy Osbourne and his record company, saying the youth shot himself after listening repeatedly to the song "Suicide Solution." Lyrics included:

Ah know people
You really know where it's at
You got it
Why, why
Get the gun and try it
Shoot, shoot, shoot.³¹¹

305. 178 Cal. Rptr. 888 (Cal. Ct. App. 1981).

306. *Id.* at 890-91. For commentary on this case and tort liability of film producers in general, see Laura W. Brill, *The First Amendment and the Power of Suggestion: Protecting 'Negligent' Speakers in Cases of Imitative Harm*, 94 COLUM. L. REV. 984 (1994).

307. See *Olivia N. v. NBC*, 141 Cal. Rptr. 511 (Cal. Ct. App. 1977).

308. *Olivia N.*, 178 Cal. Rptr. at 893.

309. *Id.* at 894. For a chilling account of a serial killer who says that the movie *RoboCop* was a factor in his crimes, see Steve Garbarino, *Imitators Under the Influence of Art*, *NEWSDAY*, Aug. 10, 1992, at 38 (Part II of series of articles entitled *Do Movies Trigger Violent Acts?*).

310. 763 F. Supp. 1144 (D. Ga. 1991), *aff'd*, 958 F.2d 1084 (11th Cir.), *cert. denied*, 506 U.S. 916 (1992).

311. *Osbourne*, 763 F. Supp. at 1145-46. Plaintiffs also contended, but could not prove, that "Suicide Solution" contained subliminal messages. *Id.* at 1146-50.

The parents sought \$9 million in damages.³¹² They contended that the music "incites imminent lawless action" and thus should be stripped of First Amendment protection. Employing the *Brandenburg v. Ohio* test, the trial court made clear the music would lose its First Amendment protection only if the court found the music was "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."³¹³ The court concluded that the music did not constitute "culpable incitement."³¹⁴ While extending its sympathy to the grieving parents, the court extended full First Amendment protection to the music.³¹⁵ The United States Court of Appeals for the Eleventh Circuit affirmed the trial court's decision,³¹⁶ and in 1992 the Supreme Court denied *certiorari*.³¹⁷

Ozzy Osbourne likewise prevailed in an earlier suit, *McCollum v. CBS*,³¹⁸ brought in 1988 by parents of another child who had committed suicide after listening to Osbourne's "Suicide Solution." This case provides another example where the plaintiff's argument of "culpable incitement" based on the *Brandenburg* test failed and the First Amendment prevailed.³¹⁹ In 1990, a judge in Nevada dismissed a similar suit against rock star Judas Priest for a 1985 suicide allegedly prompted by the album "Stained Class."³²⁰

Fewer than two years after the ruling in the *Judas Priest* case, a death occurred that precipitated another foray into the tangled judicial

312. Russell Shaw, "Suicide" Suit Dismissed; Judge: Osbourne Song Not Culpable, BILLBOARD, May 18, 1991, at 8.

313. *Osbourne*, 763 F. Supp. at 1150 (quoting *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)).

314. *Id.* at 1151.

315. *Id.* at 1152-53.

316. *Waller v. Osbourne*, 958 F.2d 1084 (11th Cir. 1992).

317. *Waller v. Osbourne*, 506 U.S. 916 (1992).

318. 249 Cal. Rptr. 187 (Cal. Ct. App. 1988).

319. *Id.* at 193.

320. See Shaw, *supra* note 312. See also Peter D. Csathy, *Takin' the Rap: Should Artists Be Held Accountable for the Violent Recorded Speech?*, 10 COMM. LAW. 7 (1992). The grisly circumstances that led to the filing of the suit also led to the making of a successful documentary, *Dream Deceivers*. The documentary tells about the lives of two "head-banger" friends who listened to Priest while getting drunk and then took a shotgun with them to a nearby park. One of the friends committed suicide; the other blew away the lower half of his face. See Noel Holston, *Powerful Film on 'P.O.V.' is a Study in Denial*, STAR TRIB., Aug. 8, 1992, at 1E. See also Janet Maslin, *Review/Film; Teen-Age Suicide, Rock and Parental Deception*, N.Y. TIMES, Aug. 6, 1992, at C15; John Koch, *Suicide: Did Judas Priest Make Them Try It?*, BOSTON GLOBE, Aug. 3, 1992, at 30; Rick Kogan, *Artistic Isolation; 'Deceivers' Explores Heavy Metal, Teen Suicide*, CHI. TRIB., Aug. 3, 1992, at 5; Walter Goodman, *Review; Television; Heavy Metal as a Seducer Unto Death*, N.Y. TIMES, Aug. 3, 1992, at C18.

thicket. Again the question was whether songs of death can be responsible for violent death. The fatal shooting of a trooper resulted in both a murder conviction of a youth and the filing of a suit against the late rapper Tupac Shakur, his record company, and its parent company.

2. Did Tupac Shakur's Music Lead to the Murder of a Policeman?

A civil suit is pending, brought by widow Linda Davidson, whose husband, Bill, a 43-year-old trooper and father of two, was shot to death on April 11, 1992. Mr. Davidson had stopped an 18-year-old motorist who was speeding down a Texas highway near Aurora in a stolen Chevrolet Blazer blaring rap music. The trooper stopped him because of a missing headlight.³²¹

At the time of the shooting, Howard was listening to *2pacalypse Now* by Tupac (or 2pac) Amaru Shakur, with lyrics such as, "Drop them, or let them drop you. I choose dropping the cop."³²² Lyrics from *Soulja's Story* include, "Cops on my tail, so I bail till I dodge them. They finally pull me over and I laugh 'Remember Rodney King' and I blast on his punk ass. Now I got a murder case What the fuck would you do?"³²³ Another song on the tape, "Crooked Ass Nigga," says, in part: "I got a tech-9 now his smokin' ass is mine Comin' quickly up the streets is the punk ass police. The first one jumped out and said freeze. I popped him in his knees."³²⁴

Because of pretrial publicity, the venue for Howard's murder case was changed from Jackson to Austin County.³²⁵ During the trial, Howard's lawyer, Allen Tanner, tried to prove the music influenced Howard, describing him as a "rap addict who lived, breathed and worshipped" the lifestyle depicted in gangsta rap. Hoping the jury

321. See, e.g., Yumi Wilson, *Back Beat of Pain and Anger in Music: Death Metal, Gangsta Rap, Grunge Rock Have a Common Theme*, S.F. CHRON., May 31, 1994, at E1; Chuck Philips, *Rap Defense Doesn't Stop Death Penalty: "The Music Affected Me," Says Ronald Ray Howard. "That's How It Was that Night I Shot the Trooper,"* L.A. TIMES, July 15, 1993, at F1; Sylvia Moreno, *Stakes High in Murder by Rap Fan; Trial Questions About 1st Amendment*, DALLAS MORNING NEWS, June 21, 1993, at 1A; Geordie Greig, *American Widow Sues for "Murder Under the Influence of Rap,"* SUNDAY TIMES, Oct. 25, 1992.

322. *Can Violent Music Breed Violent Acts?*, LARRY KING LIVE (CNN television broadcast, July 7, 1993). King's guests that night included Linda Davidson, the trooper's widow.

323. Wilson, *supra* note 321. See also Janet Elliott, *Killer's Sentence Sets Stage for Civil Case*, TEX. LAW., July 19, 1993, at 4.

324. Philips, *supra* note 321.

325. Janet Elliott, *When PR Sits Second Chair; "Spin" Purveyors' Influence Grows at Major Texas Trials*, TEX. LAW., Aug. 2, 1993, at 1.

would get a feel for the music enjoyed by Howard, Tanner played "gangsta rap" for the jurors—by Shakur, Geto Boys, Ice Cube, Ganksta N-I-P, and N.W.A.³²⁶ Tanner played songs such as "City Under Siege," "Money and the Power," "Trigger Happy Police," and "Slaughter."³²⁷ Howard testified that listening to Shakur's music gave him "a fight-back attitude versus stay away."³²⁸ And District Attorney Robert E. Bell repeatedly told the jury that he hated "gangsta rap," but that rap music should not be a mitigating factor.³²⁹

The jury convicted Rodney Ray Howard of murder on June 8, 1992.³³⁰ The jury deliberated for approximately half an hour over his guilt.³³¹ On July 14, 1993, the jury sentenced 19-year-old Howard to die.³³² The jurors deliberated for five days over his sentence,³³³ twice returning notes to the judge saying they were deadlocked.³³⁴

Widow Linda Davidson is suing Shakur, Interscope Records, and its parent company, Time-Warner.³³⁵ Her lawyer, James Cole of Victoria, Texas,³³⁶ removed the case from state court to the United States District Court for the Southern District of Texas.³³⁷ The case

326. Philips, *supra* note 321.

327. Moreno, *supra* note 321.

328. Elliott, *supra* note 325.

329. *Id.* Two teenagers who killed policeman William A. Robertson in Milwaukee in September 1994 claimed they planned the sniper attack "because of a Tupac Shakur record that talks about killing the police." See Chuck Philips, *Gangsta Rap: Did Lyrics Inspire Killing of Police?* L.A. TIMES, Oct. 17, 1994, at F2. The two were convicted of murder. See David Doege, *Walker Intended to Kill, Jury Rules*, MILWAUKEE J. SENTINEL, Dec. 8, 1995, at 1.

330. Sylvia Moreno, *Man Guilty in Rap Slaying Case; Music's Influence to Be Used in Defense Against Death Penalty*, DALLAS MORNING NEWS, June 9, 1993, at 12B.

331. On June 9, 1993, the *Dallas Morning News* reported that deliberation lasted for 25 minutes. On June 21, the *Dallas Morning News* reported that deliberation lasted for 26 minutes. Then on July 15, the *Dallas Morning News* reported that deliberation lasted for 40 minutes. See Moreno, *Man Guilty in Rap Slaying Case*, *supra* note 330; Moreno, *Stakes High in Murder by Rap Fan*, *supra* note 321; Sylvia Moreno, *Man Given Death Penalty in Rap Case; Jury Took 5 Days to Make Sentence Recommendation*, DALLAS MORNING NEWS, July 15, 1993, at 1A.

332. Moreno, *Man Given Death Penalty in Rap Case*, *supra* note 331.

333. *Id.* See also Elliott, *When PR Sits Second Chair*, *supra* note 325. The jury's decision was rendered on the sixth day, resulting in some reports that deliberations lasted six days. See Philips, *Rap Defense Doesn't Stop Death Penalty*, *supra* note 321.

334. Moreno, *Man Given Death Penalty in Rap Case*, *supra* note 331; Philips, *Rap Defense Doesn't Stop Death Penalty*, *supra* note 321.

335. Moreno, *Stakes High in Murder by Rap Fan*, *supra* note 321; Philips, *Rap Defense Doesn't Stop Death Penalty*, *supra* note 321.

336. Elliott, *When PR Sits Second Chair*, *supra* note 325; Elliott, *Slain Trooper's Family Seeks Damages from Rapper: Round 2 in 'Gangsta Rap' Case*, LEGAL TIMES, July 26, 1993, at 10.

337. Telephone Interview with Tracy Thormahlen, legal assistant to James Cole (July 6, 1994).

had been set for trial on October 23, 1995,³³⁸ but the defense moved for summary judgment, and the case was removed from the trial docket.³³⁹ On March 28, 1997, Judge John D. Rainey granted the defendant's motion for summary judgment.³⁴⁰ The judgement was entered on March 31, and the plaintiffs have thirty days to appeal.

The "goal" in filing the \$100 million suit against Time-Warner, the plaintiff's attorney said, "is to punish Time-Warner and wake up the executives who run the music business." He continued, "It is time giant corporations were stopped from shameless making money off music designed to incite impressionable young men to shoot and kill cops."³⁴¹

The suit claims the "music contained on the tape was directed to inciting young black males, including Ronald Howard, to kill policemen. The incitement was directed to and resulted in imminent action."³⁴² The suit also alleges negligence and gross negligence in producing and selling the music.³⁴³ In short, it is also a products liability suit.³⁴⁴ Three theories are present in the suit: incitement, negligence, and products liability.³⁴⁵ Under an incitement theory,

338. Telephone Interview with Tracy Thormahlen, legal assistant to James Cole (Feb. 7, 1995).

339. Telephone Interview with Tracy Thormahlen, legal assistant to James Cole (Nov. 21, 1994).

340. Davidson v. Time-Warner, Inc., No. V-94-6, slip op. (S.D. Tex. Mar. 28, 1997).

341. Greig, *supra* note 321. For more on this case, see Chuck Philips, *Testing the Limits; The Fatal Shooting of a Texas Trooper During a Routine Traffic Stop Sets up a Conflict over the Words in a Rap Song that May Wind Up . . . Testing the Limits*, L.A. TIMES, Oct. 13, 1992, at F1; Chuck Philips, *Can We Blame Rap Lyrics?: Trooper's Death Renews Debate on Song Content*, HOUS. CHRON., Sept. 24, 1992, at 1.

Of course, Time-Warner has also been at the center of controversy for the album "Body Count" by Ice-T. See, e.g., Greig, *supra* note 321; Csathy, *supra* note 320; John Leland, *Rap and Race*, NEWSWEEK, June 29, 1992, at 46; *Rapper Ice-T Defends Song Against Spreading Boycott*, N.Y. TIMES, June 19, 1992, at C24; David Treadwell, *Ice-T Rips Efforts to Suppress his "Cop Killer" Song*, L.A. TIMES, June 19, 1992, at F1; Chuck Philips, *Police Groups Urge Halt of Record's Sale*, L.A. TIMES, June 16, 1992, at F1.

For commentary on the general subject of the effects of rap music, see Jason Talerman, *The Death of Tupac: Will Gangsta Rap Kill the First Amendment?*, 14 B.C. THIRD WORLD L.J. 117 (1994); Carol Kirschenbaum, *Is It a Bad Rap?* 14 AUSTIN BUS. J., Mar. 14, 1994, at A1; Jeffrey B. Kahan, *Bach, Beethoven and the (Home) Boys: Music History as it Ought to be Taught*, 66 S. CAL. L. REV. 2583 (1993); Roger Catlin, *Song Lyrics Reflect, Don't Cause Problems*, HARTFORD COURANT, July 6, 1992, at A6.

342. Moreno, *Man Given Death Penalty in Rap Case*, *supra* note 331.

343. Elliott, *Killer's Sentence Sets Stage for Civil Case*, *supra* note 323.

344. Elliott, *When PR Sits Second Chair*, *supra* note 325.

345. Telephone Interview with Tracy Thormahlen, legal assistant to James Cole (July 6, 1994).

plaintiffs must prove intent.³⁴⁶ Under negligence theory, plaintiffs must show, among other elements, foreseeability of the harm.³⁴⁷ But under a products liability theory, a plaintiff can prevail under the doctrine of strict liability, meaning that if the plaintiff can prove that the product caused the harm, the producer will be liable regardless of intent or negligence.³⁴⁸ The suit, however, does present the anomaly of the widow Linda Davidson's not wanting the music to be a mitigating factor in Howard's capital murder case, but wanting the makers of the music to be found civilly liable for the murder.³⁴⁹ No specific amount of damages has been claimed in Davidson's suit.³⁵⁰

Tupac Shakur died in Las Vegas on Friday, September 13, 1996, six days after taking four shots in the chest,³⁵¹ after a lifetime marked by gunfire. Shakur was charged with shooting and wounding two off-

346. See *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *supra* notes 263-266 and accompanying text.

347. See *McCollum v. CBS*, 249 Cal. Rptr. 187 (Cal. Ct. App. 1988); *supra* notes 318-319 and accompanying text.

348. "Strict liability" imposes damages on the basis of "mere causation," regardless of whether a defendant was at fault. *Florida Star v. B.J.F.*, 491 U.S. 524, 547-48 (1989) (White, J., dissenting). Strict liability is often applied, for instance, to people who own wild animals. Under strict liability, if a person kept a tiger that escaped and killed another animal or a child, the person would not be asked whether he or she had been careful in caging the tiger. The only question would be: "Is this your tiger?" If yes, the person would pay for the damage, regardless of whether he or she had been careful. For a discussion of *Florida Star*, see *supra* notes 115-125 and accompanying text.

349. Elliott, *When PR Sits Second Chair*, *supra* note 325.

350. Telephone Interviews with Tracy Thormahlen, James Cole's legal assistant (July 6, 1994 and Mar. 21, 1996).

351. Robert Hilburn & Jerry Crow, *Rapper Tupac Shakur, 25, Dies 6 Days After Ambush*, L.A. TIMES, Sept. 14, 1996, at A1. Shakur's death generated extensive commentary on the meaning of his life, his death, his music, and the rap-music industry. See, e.g., Jeff Leeds & Jim Newton, *FBI Probing Rap Label for Ties to Gangs, Drugs*, L.A. TIMES, Sept. 29, 1996, at A18; Michel Marriott, *From Rap's Rhythms, a Retooling of Poetry*, N.Y. TIMES, Sept. 29, 1996, at 1; Cathy Maestri, *Drawing Lessons from a Rapper's Death*, PRESS ENTER., Sept. 29, 1996, at E3; Dana Kennedy, *Rap Wars; Did the Violence Claim Another Life?*, ENT. WEEKLY, Sept. 27, 1996, at 8; Jeff Leeds & Jim Newton, *FBI Probing Rap Label for Ties to Gangs, Drugs*, L.A. TIMES, Sept. 26, 1996, at B1; J.D. Considine, *No Longer a War of Words*, FRESNO BEE, Sept. 26, 1996, at F3; David Van Biema, *"What Goes Round . . ."*; *Superstar Rapper Tupac Shakur Is Gunned Down in an Ugly Scene Straight out of His Own Lyrics*, TIME, Sept. 23, 1996, at 40; Johnnie L. Roberts, *Blood on the Record Biz*, NEWSWEEK, Sept. 23, 1996, at 69; Michael Eric Dyson, *The Culture Wars; Tupac: Living the Life he Rapped About in Song*, L.A. TIMES, Sept. 22, 1996, at M1; Chrisena Coleman & Dave Saltonstall, *A Gangsta or Gangbusta? Rap World Debates Lessons of Shakur's Death*, DAILY NEWS (New York), Sept. 22, 1996, at 5; Esther Iverem, *Verses of Sorrow for Shakur; Rapper's Life Praised, Rebuked at Memorial*, WASH. POST, Sept. 22, 1996, at D1.

duty police officers in Atlanta on October 31, 1993,³⁵² but he was not convicted.³⁵³ Shakur was also shot five times in the groin during a robbery on November 30, 1994.³⁵⁴ Davidson's suit has proceeded without him, against his estate.³⁵⁵

VI

Are Increasing Physical Dangers Endangering the First Amendment?

A. Life Imitating Art: Timothy McVeigh and *The Turner Diaries*

When the deadly bomb allegedly planted by Timothy McVeigh demolished the federal building in Oklahoma City on April 19, 1995,³⁵⁶ it damaged America's psyche by forcing the realization that terrorists can strike anywhere. Did that blast damage the foundations of the First Amendment as well?

Evidence that Timothy McVeigh was acquainted with *The Turner Diaries* seems incontrovertible. The book, written by William Pierce,

352. See, e.g., John Leland, *Gangsta Rap and the Culture of Violence*, NEWSWEEK, Nov. 29, 1993, at 60; Kris Jensen, *Are Rap Rhymes and Crimes Connected?*, ATLANTA J. AND CONST., Nov. 23, 1993, at D3.

353. Tony Norman, *When Death Imitates Art*, PITTSBURGH POST-GAZ., Sept. 10, 1996, at B1.

354. *Rapper Tupac Shakur Robbed, Shot in N.Y.; Violence Marks Singer's Lyrics and Life*, WASH. POST, Dec. 1, 1994, at A1. The next day, a New York City jury found Shakur "guilty" of sexually abusing a female fan. Shakur was not present for the verdict. See *Shakur Found Guilty of Sex Abuse Charge*, L.A. TIMES, Dec. 2, 1994, at A31; *Wounded Rapper Convicted of Sex Abuse*, N.Y. TIMES, Dec. 2, 1994, at B1.

On February 7, 1995, Shakur received a sentence of up to four-and-a-half years. See *Rapper Gets 4 1/2 Years in Sex Case; Tupac Shakur Says He Did No Crime*, ATLANTA J. AND CONST., Feb. 8, 1995, at B9; *Newsday, Rapper Shakur Sentenced to Prison in Sexual Assault*, HOUS. CHRON., Feb. 8, 1995, at A8. He served eight months and was out on bail when he was fatally shot. See Richard Roeper, *Rapper Shakur's Music an Ode to Gang Members*, CHI. SUN-TIMES, Sept. 11, 1996, at 11; *Shakur Remains in ICU; No Leads Reported in Rapper's Shooting*, WASH. POST, Sept. 11, 1996, at D8.

355. Telephone Interview with Tracy Thormahlen, legal assistant to James Cole (Sept. 9, 1996). Some commentators think the next target for suits may be country music. A year-long study of 49 metropolitan areas led two sociologists to conclude that the greater the radio time devoted to country music, the higher the suicide rates for white listeners. David Gelman, *Beware of Those Tears in Your Beers*, NEWSWEEK, Nov. 23, 1992, at 90; Shirley Ragsdale, *Is Suicide Country Music's New Dance Partner?*, GANNETT NEWS SERV., Dec. 22, 1992, available in 1992 WL 9657211.

356. 168 people died. More than 400 were injured, including 19 children. See, e.g., Sam Howe Verhovek, *Tight Security Gets Tighter As a Sad Anniversary Nears*, N.Y. TIMES, Apr. 15, 1996, at A1.

provided a virtual blueprint of the Oklahoma bombing.³⁵⁷ The fictional work tells of a truck bomb loaded with ammonium nitrate fertilizer that destroys the FBI headquarters in Washington, D.C. when detonated at 9:15 a.m., the time of the Oklahoma City bombing.³⁵⁸ The book describes the blast: "Overturned trucks and automobiles, smashed office furniture and building rubble were strewn wildly about and so were the bodies of a shockingly large number of victims. Over everything hung the pall of black smoke, burning our eyes and lungs and reducing the bright morning to semi-darkness."³⁵⁹ But should one jump from the conclusion that a book such as *The Turner Diaries* may prove a blueprint for mayhem to the conclusion that the book should be banned? Columnist Molly Ivins made this observation: "Normally when you meet someone obsessed with a book, it's the Bible. David Koresh, for example."³⁶⁰ She opined, "I hold Timothy McVeigh's English teachers responsible for this whole situation. Didn't anyone ever tell the poor boy the difference between a good book and a bad one?"³⁶¹

A main-line publisher, Lyle Stuart of Barricade Books, has decided to print and distribute the book.³⁶² Barricade Books has published other controversial books, such as the *Anarchist's Cookbook*.³⁶³ Stuart, who is Jewish, says he will publish *The Turner*

357. Michael L. Landis & Jane E. Larson, *The Blueprint for the Oklahoma City Bombing*, CONN. LAW TRIB., Aug. 28, 1995, at 31; John Kifner, *Two Books Suggest Bomb Suspects Tried to Copy Crimes Within*, HOUS. CHRON., Aug. 21, 1995, at A2; Bill Maxwell, *Wounded Souls Follow Others' Words*, ROCKY MOUNTAIN NEWS, July 21, 1996, at 66A; Geordie Greig, *Blueprint for a Bloodbath*, SUNDAY TIMES (London), Apr. 30, 1995, available in LEXIS, News Library, TXTNWN file. A search by federal agents of the home of Terry Nichols, who is implicated in the Oklahoma City bombing, produced a book from a library, *Armed and Dangerous: The Rise of the Survivalist Right*. Judy Thomas, *Tracing Terry Nichols: Bombing Investigation Follows Gun Shows and Inquiries about Trailers*, KANSAS CITY STAR, Aug. 13, 1995, at A1.

358. Joan Lowy, *Militias Luring the Good, Bad and the Crazy: Paramilitary Style Right Wing Groups Boast 150,000 Members in 40 States*, ROCKY MOUNTAIN NEWS, Apr. 22, 1995, at 36A.

359. Quoted by Dave Saltonstall, *Probers Eye Bomber Book*, NEW YORK DAILY NEWS, Apr. 30, 1995, at 7.

360. Molly Ivins, *Tim McVeigh Demonstrates the Results of Obsession with a Bad Book*, STAR TRIB. (Minneapolis), Aug. 31, 1995, at 17A.

361. *Id.* Clearly, many bad books are available. For instance, *The Anarchist's Cookbook* (\$24.95), *Death by Deception: Advanced Improvised Booby Traps* (\$14), and *Disruptive Terrorism* (\$14.95) are available by mail. Richard Roeper, *Apr. 19 A Day That Will Live in Infamy*, CHI. SUN TIMES, Apr. 26, 1995, at 11.

362. Myrna Shinbaum, *ADL Releases Background Information on "The Turner Diaries"*, U.S. NEWswire, May 17, 1996, available in LEXIS, News Library, CURNWS file.

363. Tom Searls, *"Turner Diaries" Author Feels No Guilt*, CHARLESTON GAZ., May 17, 1996, at P1C; *Publisher Expected Criticism over 'Turner Diaries' Release*, CHARLESTON GAZ., Apr. 29,

Diaries to warn the public of the danger. On *60 Minutes*, Stuart said, "Most Americans don't realize that these people want to kill all the public officials and they want to do it now."³⁶⁴ The book, which Stuart calls "pretty disgusting," will sell for \$12.00 in paperback.³⁶⁵

B. The Internet and the Communications Decency Act

Some private organizations have asked booksellers not to stock *The Turner Diaries*.³⁶⁶ But even if these organizations reduced the number of books such as *The Turner Diaries* that are available in the United States, alternative sources of information exist. For instance, the Internet is a major source of information for leftwingers, rightwingers, and everyone else in between who likes to surf.³⁶⁷ The Internet offers an immediate access to information which books, delayed by production and distribution, cannot offer. Within hours of the Oklahoma City bombing, a diagram on how to construct a similar bomb was posted on the Internet.³⁶⁸ Trying to curb "how-to" or other

1996, at 7A; Linton Weeks, *Publisher to Market Racist 'Turner Diaries,'* WASH. POST, Apr. 24, 1996, at C1.

364. Searls, *supra* note 363. See also Liz Smith, *The Gun Nut Book*, NEWSDAY, July 10, 1996 at A11; Elizabeth Ash Velez, *Book of Hate: His Novel Linked to the Accused Oklahoma City Bomber*, William Pierce Republishes His 'Turner Diaries,' PEOPLE, June 10, 1996, at 153; Liz Smith, *Cookbook of Hate*, NEWSDAY, Apr. 8, 1996, at A15.

365. Laurence Chollet, *The Bible of the Right-Wing Militia; and Why a Publisher Found it Fit to Print*, RECORD, July 28, 1996, at E1.

366. *Id.*; Velez, *supra* note 364; Norman Oder & Sean Hill, *Should Bookstores Sell Hate Books?*, 243 PUBLISHERS WEEKLY 18 (1996); Doreen Carvajal, *Group Tries to Halt Selling of Racist Novel*, N.Y. TIMES, Apr. 20, 1996, at 8 (identifying the group as the Southern Poverty Law Center). Morris Dees, co-founder of the Southern Poverty Law Center, sent letters to the American Booksellers Association and three bookstore chains, pointing out the book's parallels to the Oklahoma City bombing. Weeks, *supra* note 363. See also Maxwell, *supra* note 357.

Of course, private groups that want to label some books as bad and urge their boycott are not engaging in censorship, which is a government function. Their activities can limit the availability of designated reading material, however, which is precisely the purpose of their endeavors.

367. For instance, a neo-Nazi group, the National Alliance, maintains a World Wide Web site. (It also publishes a comic book, the *New World Order Comix*.) Shinbaum, *supra* note 362.

On use of the Internet by the right wing, see Erik Davis, *Barbed Wire Net: The Rightwing Hunkers Down Online*, VILLAGE VOICE, May 2, 1995, at 28. He comments, "Federal control freaks and political scapegoaters will call for restrictions on inherently demonic data like bomb recipes. This will call up the inevitable libertarians, tanked on the pure oxygen of First Amendment enthusiasm and arguing to the effect that 'Information doesn't kill people, people kill people.'" *Id.*

368. Dennis Romero, *Terror in Oklahoma City: Explosive Recipes Fill Books, Cyberspace*, L.A. TIMES, Apr. 23, 1995, at 26A. The Oklahoma blast, however, is deterring some "netizens," such as "Sirius," who said that he was thinking about publishing directions on how to build a "small nuclear bomb" in his "forthcoming Balantine cyberpunk novel." He said, "But after I saw

potentially dangerous information on the Internet would seem a monumental, if not impossible, task.³⁶⁹ Government attempts to control indecency on the Internet have failed so far. The Communications Decency Act of 1996³⁷⁰ hit a judicial barrier in its confrontation with First Amendment advocates. In *American Civil Liberties Union v. Reno*,³⁷¹ a three-judge panel granted a preliminary injunction against enforcement of the CDA's indecency provisions, finding its provisions unconstitutionally vague.³⁷² Judge Stewart Dalzell commented:

The CDA will, without doubt, undermine the substantive, speech-enhancing benefits that have flowed from the Internet.

. . .

. . .

Some of the dialogue on the Internet surely tests the limits of conventional discourse. Speech on the Internet can be unfiltered, unpolished, and unconventional, even emotionally charged, sexually

what happened in Oklahoma City, I thought, 'My God, what if someone actually used this information.' *Id.*

Information on how to build a nuclear bomb has been available for some time. *United States v. Progressive, Inc.*, 467 F. Supp. 990 (W.D. Wis. 1979) (notorious hydrogen bomb case).

369. Attorney Donald P. Russo disagrees, putting his faith in technology: "Surely, those bright lights who created this marvelous new technology can now apply their skills to devising a way to 'police' it against those who wish to harm our children." Donald P. Russo, *Electronic Fingerprints Would Help Police Internet of Sociopaths*, MORNING CALL (Allentown, Pa.), Aug. 30, 1996, at A19. See also Transcripts of the Senate Comm. on the Judiciary, Subcomm. on Terrorism, Technology, and Government, Information on Mayhem Manuals and the Internet, May 11, 1995.

370. Communications Decency Act of 1996, in Title V, Telecommunications Act of 1996, Pub. L. No. 104-104, § 502, 110 Stat. 56, 133-43 (1996) (to be codified at 47 U.S.C. § 223(a)-(h)).

371. *ACLU v. Reno*, 929 F. Supp. 824, 883 (E.D. Pa.), *prob. juris. noted*, 117 S. Ct. 554 (1996).

372. As the court explained:

Plaintiffs focus their challenge on two provisions

Section 223(a)(1)(B) provides in part that any person in interstate or foreign communications who, "by means of a telecommunications device," "knowingly . . . makes, creates, or solicits" and "initiates the transmission" of "any comment, request, suggestion, proposal, image or other communication which is obscene or indecent, knowing that the recipient of the communication is under 18 years of age," "shall be criminally fined or imprisoned."

Section 223(d)(1) ("the patently offensive provision"), makes it a crime to use an "interactive computer service" to "send" or "display in a manner available" to a person under age 18, "any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication."

ACLU, 929 F. Supp. at 828-29 (footnotes and emphasis omitted).

explicit, and vulgar in a word, "indecent" in many communities. But we should expect such speech to occur in a medium in which citizens from all walks of life have a voice. We should also protect the autonomy that such a medium confers to ordinary people as well as media magnates.³⁷³

The attitude expressed by Judge Dalzell concerning restrictions of "indecent" material on the Internet could also apply to attempted restrictions of "dangerous" or "harmful" information. If a provision banning harmful information, such as bomb recipes from the Internet, were crafted so as to pass constitutional muster, the problem of short-wave radio transmissions by William Pierce and others would remain.³⁷⁴ Trying to stop this form of communication would be nearly impossible.

With so much information on bomb-making available, putting the genie back in the bottle would seem difficult, but each incident of terrorist bombing increases the desire to at least cap the bottle. The flurry of hearings on Capitol Hill in the wake of the bombing in Oklahoma City demonstrates the legislative concern about violent threats to the status quo.³⁷⁵ The legislative angst arguably mirrors the concern nationwide. On April 24, 1996, President Clinton signed an

373. *Id.* at 877-81.

374. Morris Dees, *Militias Still 'A Recipe for Disaster,'* USA WEEKEND, Apr. 14, 1996, at 4.

375. See, e.g., *Nature and Threat of Violent Anti-Government Groups in America*, Hearing Before The Subcomm. on Crime of the Committee on the Judiciary, House of Representatives, 104th Cong., 1st Sess. (1995). After calling the hearing to order, Rep. McCollum, a Florida Republican, was careful to explain:

First, I want to clearly state what this hearing is not about. Today's hearing is not about ideologies, political doctrines or mind-sets that are odd or troubling, or even detestable. Governments can't and should not try to restrict thoughts or expressions of its citizens. This hearing is also not about undesirable speech, such as hate-filled rhetoric or bigotry. The First Amendment to the Constitution is the final word on that subject. It's not about free association of people, no matter how much we may dislike the interests that draw them together. Moreover, this hearing is not about guns. Gun ownership is guaranteed by the Constitution

You might ask then, What is this hearing about? The answer is simple: This hearing is about violent behavior that threatens civil order.

See also Senate Select Intelligence Comm. Joint Hearing on Terrorism with the Senate Judiciary Comm., Aug. 1, 1996; Summary Statement of Ralph C. Ostorski, Subcomm. on Commerce, Trade, and Hazardous Materials, May 22, 1995. Ostorski, who is Chief of the Arson and Explosives Division, Bureau of Alcohol, Tobacco and Firearms, discussed "the use of fertilizers and other chemicals in explosive mixtures and . . . the capability ATF has in addressing the issue."

anti-terrorism law,³⁷⁶ vowing that "America will never tolerate terrorism."³⁷⁷

C. Media and the Language of War

A tragedy of large proportions, such as the Oklahoma City disaster, or bombings of the World Trade Center, or Atlanta's Centennial Olympic Park, is not the only way to heighten public awareness of danger. A steady stream of smaller stories about bombings can have a cumulative effect. Although an increase in the number of stories on a subject may mean only that the media has been *focusing* more on the subject, bombings incidents *have* increased, according to Bureau of Alcohol, Tobacco, and Firearms statistics.³⁷⁸ The statistics provide objective credence for subjective feelings of heightened danger.

Dreadful, graphic illustrations carried by the news media show what can happen when information, neutral in and of itself, gets into the wrong hands, such as those of teenagers burned by their bomb-building experiments. At least one has died from burns sustained while trying to make a homemade bomb—guided by the directions in the *Anarchist's Cookbook*, available on the Internet.³⁷⁹ Instances of young people using instructions from the Internet to make bombs and then hurting themselves, or terrorizing others, or threatening to blow up schools, come from every region of the country.³⁸⁰ The information,

376. Antiterrorism and Effective Death Penalty Act of 1996, 104 Pub. L. No. 132, 110 Stat. 1214 (1996).

377. John F. Harris, *Clinton Signs 'Mighty Blow' Against Terrorism: Softened Measure Becomes Law*, *ACLU Still Objects to Death Penalty Appeal Limits*, WASH. POST, Apr. 25, 1996, at A04. Oklahoma bombing survivors and families of victims watched President Clinton sign the bill. See, e.g., *Bomb Survivors Watch Clinton Sign Anti-Terrorism Bill*, *COMMERCIAL APPEAL* (Memphis), Apr. 25, 1996, at 4A.

378. For statistics, see, for example, Bruce Frankel, *New Teen Fad: Building Bombs*, *USA TODAY*, May 6, 1996, at 2A; Andrea Stone, *A Pestilence for the 21st Century: The Bomb*, *USA TODAY*, May 15, 1995, at 6A; John Meyer & Paul Feldman, *Move to Curb Explosives Taking on a New Urgency*, *L.A. TIMES*, May 6, 1995, at A1.

For a history of bombings, see Nina J. Easton, *America the Enemy: Their Politics Are Light Years Apart, But the Bombers of the '60s and '90s Share Volatile Rhetoric, Tangled Paranoia and a Belief that Violence Is a Legitimate Weapon*, *L.A. TIMES*, June 18, 1995, at 8.

379. Donald P. Russo, *supra* note 369; Ron Devil, *Recipe for Tragedy from the Internet*, *MORNING CALL* (Allentown, Pa.), Aug. 25, 1996, at B1.

380. Gaylord Shaw, *Recipe for Terror/Teen Bombers Find What They Need on Internet*, *NEWSDAY*, Apr. 18, 1996, at A7 (covering examples from California, Florida, Kansas, New York, New Hampshire, New Jersey, Michigan, Rhode Island, and Texas). For other instances of youths building bombs using *The Anarchist's Cookbook* obtained from the Internet, see Simon Pristel, *Youths Burned When Homemade Napalm Ignites*, *BOSTON HERALD*, Aug. 8, 1996, at 5 (two

like the Internet, is available nationwide. Other selections available on the Internet include: *The Terrorist's Handbook*, *Improvised Land Mines*, *Expedient Hand Grenades*, *Homemade Grenade Launchers*, and *Homebuilt Flamethrowers*.³⁸¹

Awareness of danger, however, does not necessarily mean that individuals will voluntarily take safety measures. For instance, while fear mounted in Denver because of firebombers, a local newsstand chain *increased* its offerings of "how-to" books on bomb building.³⁸²

Whatever the nomenclature—the slippery slope, the never-ending spiral, the Apocalypse, Doomsday—the feeling of a descent to disaster creates a cloying pessimism that elicits the vocabulary of war. In custody, McVeigh told FBI agents who questioned him, "I am a prisoner of war."³⁸³ The war mentality colors other areas of right-wing parlance, as well. In the wake of the fire at the Branch Davidian compound in Waco, Texas, some right-wingers call the Federal

children, aged 14 and 11, suffered serious burns); Pete Slover, *Teen Hurt by Bomb Got Plans Through Computer*, DALLAS MORNING NEWS, July 26, 1996, at 25A (15-year-old boy lost three fingers); *Internet Aids in Kids' Bombs*, SAN DIEGO UNION-TRIB., Apr. 14, 1996, at A3; Geoff Boucher, *4 Teens Admit to Bombs in Mission Viejo Schoolyard*, L.A. TIMES, Apr. 13, 1996, at B1 (four teenaged boys crafted bombs; one exploded on a school's playground, injuring five-year-old); *For the Record: Bombs on Internet*, SALT LAKE TRIB., Mar. 10, 1996, at B2 (three teenagers set off bomb outside a church). See also Steve Marlowe, *Teen Bomb Makers Frustrate Cops; No Way to Keep Lid on Recipes*, RECORD, May 28, 1995, at A3 (covering situations where computer-accessed information played a role, including cases such as two teenagers arrested for allegedly plotting to bomb a high school and two twelve-year-olds who placed napalm-brew in their school lockers); Christopher John Farley, *America's Bomb Culture*, TIME, May 8, 1995, at 56 (after New Jersey teenagers tried to extort \$1.3 million from high school using faxed bomb threats, police found a copy of *Jolly Roger's Cookbook* downloaded from the Internet at one suspect's home).

For incidents involving pipe bombs, see Frankel, *supra* note 378. For non-Internet-related instances of young people with bombs, see *Home Bomb Blows Up in Teens' Faces*, SEATTLE TIMES, June 26, 1996, at B2; Nordeka English, *Officials: Boy with Bomb Parts Targeted School*, ST. LOUIS POST-DISPATCH, Apr. 25, 1996, at 4B.

Not only young people use *The Anarchist's Cookbook* to threaten mayhem. See Bill Swindell, *Federal Conspiracy Trial Set to Begin*, TULSA WORLD, Mar. 31, 1996, at A17 (three persons charged in Oklahoma with threatening to blow up gay bars, abortion clinics, and an Anti-Defamation League Building); Tom Foreman, Jr., *Accused Bomber Leaves Trail: Affidavit Outlines Raleigh Investigation of Mail Bomb Suspect*, HERALD-SUN (Durham, N.C.), July 18, 1995, at A1 (mail bomb injured wife; husband arrested).

381. Gaylord Shaw, *supra* note 380. A *Newsday* researcher found those titles in one hour on the Internet. *Id.* Also available on the Internet is *The Collection*, a ghastly collection of stories about results of amateurs making explosives, made available by Frank Heasley, who ripped his legs open with explosives in the late 1950's. Lou Dolinar, *Computers in the '90s: Danger Lurking on the Internet*, NEWSDAY, May 9, 1995, at B27.

382. Ann Carnahan, *Stores Increase Stock of Books on Killing, Bombs: Newsland Chain Loads Up on Titles About Explosives*, ROCKY MOUNTAIN NEWS, Feb. 22, 1996, at 4A ("It's not that we're just selling this to make money . . . It's our solid belief that we can't censor.")

383. Evan Thomas, et al., *The Plot*, NEWSWEEK, May 8, 1995, at 28.

Bureau of Investigation the "Federal Bureau of Incineration."³⁸⁴ Some also say that the letters "BATF" ("Bureau of Alcohol, Tobacco, and Firearms") stand for "Burn All Toddlers First."³⁸⁵

When the language is that of war, when the persistent, popular feeling is that the country is indeed at war, then, arguably, liberties become a luxury that a country can do without, as stability becomes the staple from which the populace draws its sustenance. Will the luxury of the First Amendment wither in order to maintain life uninterrupted by bomb blasts? First Amendment impairment during times of turmoil would not be new. In the first major First Amendment case heard by the United States Supreme Court, Chief Justice Oliver Wendell Holmes articulated his famous "clear and present danger" test:³⁸⁶

[T]he character of every act depends upon the circumstances in which it is done. . . . The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. . . . The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight³⁸⁷

While the Court eventually moved to the incitement standard of *Brandenburg*,³⁸⁸ the hard fact remains that not only freedom of speech and press but also freedoms of association and privacy become threatened when peace and safety have themselves become threatened.³⁸⁹ One concern for persons wanting to protect privacy is

384. Easton, *supra* note 378.

385. Dennis Wagner, *What Drives Viper Case, Politics or Real Threat? U.S. Finding Smoking Guns, But No Plot*, ARIZONA REPUBLIC, July 12, 1996, at A1; Thomas et al., *supra* note 383; Brigid Schulte, *Right-Wing Militia Groups Fear Atrocities by Federal Agents: ATF Called Bunch of 'Gun-Grabbing Goons'*, PHOENIX GAZ., Apr. 28, 1995, at A14.

386. *Schenck v. United States*, 249 U.S. 47, 50 (1919).

387. *Id.* at 52 (citations omitted). In a later case, *Dennis v. United States*, 341 U.S. 494 (1951), the Court turned to Justice Learned Hand for a definition of "clear and present danger": "In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." *Id.* at 510 (citation omitted).

388. For incitement theory and cases, see *supra* Part V.

389. For instance, President Clinton has vowed to expand government's power to wiretap phones in an effort to combat terrorism. See, e.g., David Jackson, *Clinton, Lawmakers Vow Unity Against Terrorism: Congress to Reconsider Broader Wiretap Power*, DALLAS MORNING NEWS, July 30, 1996, at 1A. For federal wiretap law, see 18 U.S.C.A. §§ 2510-2522 (West Supp. 1994).

that the greater the danger of terrorism, the less value society might place on phone and e-mail privacy.³⁹⁰ The “chilling” effect would be

Opinions differ on how much of a threat to privacy these so-called “roving” wiretaps would pose. Under a roving wiretap, a law-enforcement agent could listen to phone conversations made on any phone used by a suspect instead of only listening in on the suspect’s home or business phones. Agents would still have to apply for a wiretap order from a judge or invoke the emergency-circumstances provision that is currently a part of federal wiretap law. *Wiretapping Authority*, N.J. Law J., Aug. 12, 1996, at 26.

Is the additional wiretap power proposed by Clinton *de minimis*? See *id.* (favoring the increased wire-tap power):

[W]e believe in this instance that the danger to our privacy is so minimal that the request for an adjustment to wiretap authority is justified. Since the technology exists to enable this type of surveillance, we see no sound reason why it should not be authorized legally, so long as the customary and established protections are adhered to strictly.

Or does additional wiretap power pose a real threat to privacy? See Kimberly Crockett, *Securit: Safety Not Worth Sacrifice of Liberty*,” PHOENIX GAZ., Aug. 1, 1996, at B9. David Jackson quotes opinions on both sides of the privacy issue concerning expanding the government’s wiretap power. Jackson, *supra*. As one commentator posed the issue:

The debate . . . in Congress over how to craft a law-enforcement response to terrorist attacks shows the American political system doing what it does best: forging imperfect compromise, this time between public safety and personal liberty, between the right to drop our children off at the downtown day care, assuming they will be safe, and the right to join in political dissent without worrying that the phone is tapped.

Easton, *supra* note 378.

390. Law-enforcement authorities already have the power to use search warrants to hack into private computer files. Reportedly, Detective Tom Goodrow of the Hartford, Connecticut bomb squad was the first to use a warrant to search files of the operator of a computer bulletin board offering bomb recipes. He would like even more aid for law-enforcement authorities. See Marlowe, *supra* note 380.

One proposed aid for law-enforcement authorities, supported by President Clinton, is the “clipper chip” or “dual key escrow.” This technology would enable the government to unscramble messages that had been encrypted using mathematical functions. The government would hold copies of the deciphering key, the mathematical combination for unlocking encrypted messages. See, e.g., Jack R. Paton, *Government Frets Over ‘Secret’ Code Availability*, ST. PETERSBURG TIMES, Aug. 1, 1996, at 2A; John Markoff, *Clinton Proposes Initiatives on the Scrambling of Data*, N.Y. TIMES, July 13, 1996, at 34; Erik Ness, *Big Brother at Cyberspace: Will Your Freedom and Privacy Be Roadkill on the Information Superhighway?*, PROGRESSIVE, Dec. 1994, at 22.

The concern of the government is that many violent, unscrupulous persons such as terrorists communicate via encrypted messages using encryption technology that is readily available. A devotee of “freeware” (also known as “shareware”), Philip Zimmerman, made available worldwide an encryption program known as “Pretty Good Privacy.” See Ness, *supra*.

PGP is available for free down-loading from the Massachusetts Institute of Technology’s web site. See Dave Farrel, *Encrypting for Privacy*, SUN SENTINEL (Fort Lauderdale), Sept. 1, 1996, at 1E. Encryption, Zimmerman explains, is like an “envelope” for an e-mail message. Just as an envelope protects the privacy of persons sending a letter through the United States postal system, encryption protects e-mail. See John Yemma, *When Your Private E-Mail Goes Public*, BOSTON GLOBE, Sep 2, 1996, at C1. On the envelope analogy, see also John M. Moran, *Government Reboots its Effort to Gain Access to Electronic Mail*, HARTFORD COURANT, July 18, 1996, at E2.

felt on speech intended for private communication, as well as that intended for mass communication.

VII Conclusion

Commenting on *Braun v. Soldier of Fortune Magazine*³⁹¹ and the pending suit against Tupac Shakur's estate,³⁹² Bruce Fein says:

The negligence theories behind the suits against [*Soldier of Fortune*] and Time Warner should be applauded, not deplored, by genuine friends of the mass media. They simply seek to hold publishers to a reasonable standard of care that is customary in the industry and that society has a reasonable right to expect. Negligence, moreover, is a far less demanding standard than the strict liability that most industries confront. Additionally, only a fevered imagination could perceive any public enlightenment in the words under challenge in the [*Soldier of Fortune*] and Time Warner cases.

A rogue elephant press strutting on legal pedestals is destined to self-destruction. A far-sighted mass media would . . . rejoice at a few salutary lawsuits to drive out irresponsible practices that subvert public trust and respect.³⁹³

Laying aside the question of whether "rogue elephants" can strut, the important issue is whether the media should "rejoice at a few salutary lawsuits." Is it healthy to rejoice when the law comes crashing down on a few, especially if it leaves many others in a quandary? A comment on the *Braun* case poses this question: "What if a person contracts AIDS from responding to a 'dating' ad? What will be the limits on this claim for negligent publication of an ad?"³⁹⁴ His answer

One message which Zimmerman received, and which demonstrates why he is so opposed to giving government the key to unscramble and read encrypted messages, came from Latvia: "Phil I wish you to know: Let it never be, but if dictatorship takes over Russia your PGP is widespread from Baltic to Far East now and win [sic] help democratic people if necessary. Thanks." *Id.* In front of a House Subcommittee in 1993, he worried aloud about privacy because, as he said, "very bad people" may be elected in a democracy. "'Normally, a well-functioning democracy has ways to remove these people from power,' Zimmerman continued, 'but the wrong technology infrastructure could allow such a future government to watch every move anyone makes to oppose it. It could very well be the last government we ever elect.'" See Ness, *supra*.

391. See *supra* notes 81-103 and accompanying text.

392. See *supra* notes 321-355 and accompanying text.

393. Bruce Fein, *Shaking the First's Foundations?: Healthy Lawsuits*, WASH. TIMES, Sept. 29, 1992, at F1 (emphasis added).

394. Slade Metcalf, *Ad Liability: How Real is the Threat?*, 18 FOLIO 195, available in 1989 WL 2586665.

is not one designed to make journalists rejoice: "Time may tell."³⁹⁵ In the meantime, what are journalists and others engaged in mass communication supposed to do? In trying to keep a distance from a nebulous zone of potential liability, they may well engage in self-censorship. Of course, self-censorship has its positive aspect insofar as it promotes "responsibility"—what the Supreme Court calls the "undoubtedly desirable goal" of being responsible, a virtue which "cannot be legislated."³⁹⁶ But the thought of rules self-imposed in order to avoid nebulous zones of liability can strike terror in First Amendment-loving hearts because the chill of self-censorship can dampen expression and creativity.

Yet, so many gag reflexes have been activated by what many people perceive as mass media irresponsibility that people are welcoming, even praising lawsuits. The *Hit Man* suit is the prime example.³⁹⁷ A former attorney general of West Virginia, Charles G. Brown, who wrote *First Get Mad, then Get Justice: The Handbook for Crime Victims*, said:

The "Hit Man" manual is clinical. It painstakingly explains how to obtain contracts for money, how to commit murder, how to leave no incriminating evidence behind, and how to find the next client to get paid for the next murder. The manual is remorseless. . . . The author advises the contract killer which weapons are most effective, where to shoot the victim, and even how to avoid getting blood squirted onto himself.

. . .

If the natural and logical consequences of its willful actions helped lead to these murders-for-hire, the publisher should not be allowed to hide behind the 1st Amendment. . . .

. . . [T]his case is not about free speech at all. It is about responsible behavior, something for which we are all accountable, including book sellers.³⁹⁸

Nor does Bruce Fein, who speaks against the "rogue elephant press,"³⁹⁹ see any need for protection of *Hit Man*'s publisher. He says, "Drawing sensible lines is the hallmark of enlightened law. The First Amendment is no exception. Experience discredits the idea that to

395. *Id.*

396. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256 (1974).

397. For supportive comments on the *Hit Man* suit from Rod Smolla, Stuart Taylor, and Bruce Fein, see *supra* note 54 and accompanying text and note 55.

398. Brown, *supra* note 25.

399. See *supra* note 393 and accompanying text.

ban 'Hit Man . . . ' is but a step away from banning the Lincoln-Douglas debates."⁴⁰⁰

The question is where to draw the "sensible" line that Fein thinks exists. Clearly *Hit Man* is a long distance from the Lincoln-Douglas debates, but consider Stephen King's book *Rage*. The book describes a fictional teenager who uses a gun to hold his algebra class hostage. The teen kills a teacher and an instructor, and contemplates killing a popular male student. On February 2, 1996, Barry Loukaitis went to his junior high school in Washington state, where he murdered his algebra teacher and two male students. Police reportedly found a copy of *Rage* on Loukaitis's nightstand.⁴⁰¹

When Mark David Chapman murdered John Lennon, he clutched a copy of *The Catcher in the Rye*, by J.D. Salinger.⁴⁰² Martin Scorsese's film *Taxi Driver* aroused John Hinkley, who shot then-President Ronald Reagan in an attempt to impress actress Jodie Foster.⁴⁰³ Should King, Salinger, or Scorsese be liable for negligence? How about Shakespeare? James Gill asks what crimes the two young people who saw Oliver Stone's movie *Natural Born Killers* might have committed if they had been exposed to repeated showings of Shakespeare's *Richard III*. "At least Stone hasn't so far suggested killing all the lawyers," Gill quips.⁴⁰⁴ What about movies that feature bombings, such as *Top Dog*, *Die Hard with a Vengeance*, *Speed*, and *Blown Away*?⁴⁰⁵

Even for obscenity, the United States Supreme Court has an escape clause of sorts, known as the "SLAPS" test. The Court asks

400. Bruce Fein, *Crime, Responsibility, and Free Speech*, WASH. TIMES, Feb. 27, 1996, at A17.

401. *Parallels in King Novel, School Shooting Noted*, COMM. APPEAL (Memphis), Apr. 11, 1996, at 5A. For Stephen King's views on a writer's moral responsibility, see Stephen King, *The Last Waltz—Horror and Morality, Horror and Magic*, in *DANCE MACABRE* (Chapter X) (New York 3d ed. 1983).

402. Freedland, *supra* note 39.

403. Jeff Simon, *Dark Vision; the Case for Scorsese's 'Taxi Driver'*, BUFFALO NEWS, July 5, 1996, at 20G. *See also*, Freedland, *supra* note 39. Stanley Kubrick, director of the movie *A Clockwork Orange*, voluntarily banned his own movie from further distribution in Great Britain after two youths imitated actor Malcolm McDowell's rape of a woman to the tune of *Singin' in the Rain*. *See* Shnayerson, *supra* note 39 and accompanying text.

404. James Gill, *Movie Effects*, TIMES-PICAYUNE (New Orleans), July 7, 1996, at B7.

405. *See* Farley, *supra* note 380. A March 1, 1997 shoot-out in North Hollywood by two bank robbers wearing black body armor and firing automatic weapons was reminiscent of the movie *Heat*. After nearly an hour of raging battle, ten police officers and five bystanders lay wounded, and the robbers lay dead. *See* Shawn Hubler, *The North Hollywood Shootout; Pulp Reality in L.A.*, L.A. TIMES, Mar. 1, 1997, at A1; B. Drummand Ayres, Jr., *Police Kill 2 Bank Robbery Suspects in a Wild Gun Battle*, N.Y. TIMES, Mar. 1, 1997, at A7.

"whether the work, *taken as a whole*, lack serious literary, artistic, political, or scientific value."⁴⁰⁶ If the work does, then it passes constitutional muster and cannot be censored. In the Court's words, "[I]n the area of freedom of speech and press the courts must always remain sensitive to any infringement on genuinely serious literary, artistic, political, or scientific expression."⁴⁰⁷ Of course, the Court in obscenity cases is addressing the question of whether a work can be banned outright, not whether the work's creators can be held accountable if their work causes harm.

John Grisham wants accountability through legal liability. He draws an implicit analogy by speaking of the Second Amendment to make his point about the First Amendment. Stating that "no right is absolute," Grisham notes that the Second Amendment right to keep a loaded gun does not absolve the owner of negligence if a child picks the gun up from a coffee table and shoots himself.⁴⁰⁸ Oliver Stone replies, "one may presume that, according to Mr. Grisham's logic, the next time a 'righteous' revenge murder takes place (or, for that matter, the rape of a child) he will be happy to assume liability if it can be shown that the offender had read or seen [Grisham's] *A Time to Kill*."⁴⁰⁹

Grisham says, "It will take only one large verdict against the likes of Oliver Stone, and his production company, and perhaps the screenwriter, and the studio itself, and then the party will be over."⁴¹⁰ The problem is, however, that if the party is over for Stone and his "likes," the party may well be over for Grisham, too. As Vincent Blasi says, "[T]his ideal of legal liability could come back to haunt authors like John Grisham. Censorship, like revolution, often devours its own children."⁴¹¹

Stone says that Grisham is "on the age-old hunt for witches to explain society's ills . . . ignoring Shakespeare, who reminds us that artists do not invent nature but merely hold it up to a mirror."⁴¹² He also quips, "Has your lawyer-husband been unfaithful? Slap a summons on John Grisham, since, after all, he wrote 'The Firm.'"⁴¹³

406. *Miller v. California*, 413 U.S. 15, 24 (1973) (emphasis added).

407. *Id.* at 22-23.

408. Shnayerson, *supra* note 39, at 144.

409. *Id.*

410. *Id.*

411. Gleick, *supra* note 40.

412. Shnayerson, *supra* note 39, at 143.

413. *Id.* at 143-44.

But Grisham replies that “when causation is *clearly* proven, then the ‘artist’ should be required to share the responsibility along with the nut who actually pulled the trigger.”⁴¹⁴

The problem with Grisham’s view is that he would hold the creator of a work responsible for what a “nut” does in reaction. He is calling for strict liability for the actions of a person whose mind is diseased or in some other way defective (possibly affected by LSD or some other drug). He is not even trying to limit the accountability to the typical negligence standard, the harm a “reasonably prudent” artist could reasonably foresee.⁴¹⁵ Given Grisham’s view, what creative person could ever be safe? Could Dr. Seuss have written *How the Grinch Stole Christmas* without fear of liability? After all, some “nut” (to use Grisham’s term) could be inspired to break into homes and steal Christmas presents. If “causation is *clearly* proven,” should Dr. Seuss or his estate be required to pay to help replace missing Christmas gifts?

The fact is that we live in a dangerous world. How safe do we want to make it? Nature herself offers many dangers. Do we restrict access to a bluff because some people might be inspired to jump or push someone else off? Do we restrict access to lakes and rivers because some people might be inspired to drown themselves or to hold other people under? If we excuse Mother Nature, then we can ask the same for tall buildings or swimming pools. But negligence law concerning real property has developed to make arguably reasonable distinctions. “Attractive nuisances” can be harmful, whether natural or man-made, and appropriate safeguards can be required in order for

414. *Id.* The larger context of Grisham’s quote is:

The issue is not whether Oliver Stone’s movies are protected by the First Amendment. They are. He can make anything he wants, regardless of how nauseating. Pornographers share the same protection, because, hey, they’re artists! But the issue is responsibility: should Stone and his ilk be held responsible if, *and only if*, a direct causal link can be proven between a movie (or a book or a song) and the violence inspired by it? I’ll admit this is a very difficult standard to meet, but when causation is *clearly* proven, then the “artist” should be held liable. And the “artist” should be required to share the responsibility along with the nut who actually pulled the trigger.

Id.

415. For coverage of the “reasonably prudent” person standard, see *supra* notes 12-13 and accompanying text.

The Supreme Court has rejected the “nut” standard, more genteelly labeled as a “particularly susceptible person” standard, in obscenity cases. It struck down the *Hicklin* test, saying, “The early leading standard of obscenity allowed material to be judged merely by the effect of an isolated excerpt upon particularly susceptible persons.” *Roth v. United States*, 354 U.S. 476, 489-499 (1957) (rejecting *Regina v. Hicklin*, L.R. 3 Q.B. 360 (1868)).

owners to escape liability. Now negligence law is trying to make reasonable distinctions where First Amendment activities are concerned. Granted, the task is difficult.

In trying to draw the line between acceptable and unreasonably dangerous communications, one runs onto some hallowed ground. Negligence law should not be used to “chill” news, even though news accounts can inspire “copy cat” crimes. Surely Grisham would not propose that the nightly newscasters be held liable if “causation is clearly proven” between a newscast and a “nut” who decides to replicate the crime so he or she can also be in the news?

At the other end of the spectrum, however, are the “how to” books, which seemingly intend for persons to follow their directions and cause mayhem. In the defendant’s summary judgment motion in the *Hit Man* case, the defendant’s concession was damning: “[D]efendants intended and had knowledge that their publications would be used, upon receipt, by criminals and would-be criminals to plan and execute the crime of murder for hire, in the manner set forth in the publications.”⁴¹⁶ Trying to defend this kind of activity might seem little more difficult than defending the execution of the crimes themselves. Nevertheless, the defendant publisher won its summary judgment motion.⁴¹⁷

The step appears small between holding *Soldier of Fortune* accountable and holding Paladin Press accountable in the *Hit Man* case. The magazine provided an ad for a contract assassin, and the publisher provided the blueprint for a contract assassin. But what if

416. *Rice v. Paladin Enters.*, 940 F. Supp. 836, 839 (S.D. Md. 1996). See also Stuart Taylor, Jr., *A Constitutional Suicide Pact?* LEGAL TIMES, Aug. 5, 1996, at 23. Taylor comments, “I like my freedom of speech as well as the next fellow, but I’m with Smolla on this one—at least on the summary judgment issue.” *Id.*

Bruce Fein also argues for liability in the *Hit Man* case:

An arch legal principle holds persons civilly liable for the criminal conduct of others in a variety of circumstances. Landlords are responsible for failing to undertake safety measures to protect tenants from crime that might reasonably be anticipated. Gun dealers are similarly liable for sale to customers who they had reason to believe would use the firearms in crime. Bar owners are open to liability for alcohol sales to intoxicants who subsequently commit mayhem in violation of DWI prohibitions. Further, owners whose property is used in crime expose themselves to forfeiture for neglecting reasonable precautions against such anti-social use.

The theory behind these liability rules is sound and simple:

Citizens and businesses are obliged to act reasonably to avoid assisting or facilitating crimes that might be reasonably anticipated. . . . As applied to Paladin Press, the theory makes a persuasive case for liability.

Fein, *supra* note 55, at A17.

417. *Rice*, 940 F. Supp at 849.

the same information as in *Hit Man* were provided in a novel or a movie? Perhaps *intent* could provide a necessary distinction. If the novelist or movie-maker had no intent for the book or movie to be used as a blueprint, then they would be relieved of liability. *Hit Man* had that intent. Oliver Stone denies any intent to cause the carnage resulting from *Natural Born Killers*. Instead, Stone says his intent was to create a satire about the way the American culture and its media crave violence.⁴¹⁸

"Intent," of course, is a primary ingredient for incitement cases. The lack of intent should protect Stone for *Natural Born Killers*, and it should protect the estate of Tupac Shakur and the record company for gangsta rap. In short, for the mass media, an "incitement" theory does not pose a great potential danger.⁴¹⁹ But negligence is a different matter. While incitement requires "intent," which is difficult to prove, negligence merely requires "foreseeability"—determined, one might say, with twenty-twenty hindsight.⁴²⁰

Under current negligence law as applied to media, *reliance* can be an important element for liability. If one relies on an aeronautical chart and then slams into a mountain, the survivors can collect from the chart's publisher. If a *guarantee* is made by a printer, such as the "Good Housekeeping" seal of approval, then the printer may well have sealed his or her liability. When the vulnerability of a crime victim increases because a newspaper releases the victim's name and address while the assailant is still at large, the paper may pay. Such liability is increasing, as shown by *Soldier of Fortune* with its liability for an assassin's ad.

Hit Man could still take a "hit," which would arguably be a logical extension of the liability found in *Soldier of Fortune Magazine*. A loss would send chills through "how to" publishers. If Tupac Shakur's estate and record company are found liable for the shooting death of the trooper, gangsta rap singers might consider heading for cover. If Stone is found liable for *Natural Born Killers*, then open season will

418. See Shnayerson, *supra* note 39.

419. For incitement cases, see *supra* Part IV.

420. The trial judge in *Braun v. Soldier of Fortune Magazine, Inc.* was cognizant of this problem, and he told the jury: "Now, of course, the tendency to read the advertisement in question in hindsight is hard to avoid, but it must be avoided. The test for you is not how the advertisement in question reads now in light of subsequent events, but rather how the advertisement read to a reasonable publisher at the time of publication." 968 F.2d 1110, 1113 (11th Cir. 1992), *cert. denied*, 506 U.S. 1071 (1993). For a discussion of *Braun*, see *supra* notes 81-103 and accompanying text.

exist for anyone looking either for an excuse to share liability or for a deep pocket. Grandparents will perhaps have to watch the fairytales they tell their grandchildren. After all, the witch gave Snow White a poison apple. If little Johnny hears the tale and decides to give his teacher an apple laced with something he discovered on the Internet or in a junior chemistry set At least the grandparents would likely share liability with a deep pocket, Snow White's creator, Walt Disney, Inc.

In the meantime, the bottom line is that journalists and others engaged in mass communication encounter a foreseeable risk of *financial* harm to themselves if they disregard the doctrine of negligence as applied to the media. The language in *Hyde* states clearly the test journalists must remember:

It is the likelihood of injury to another that gives rise to the duty to exercise due care. The test of negligence liability is foreseeability: that the actor knows or has reason to foresee that the act involves an unreasonable risk of injury to another but fails to protect against that hazard.⁴²¹

Where ink can draw blood, courts will draw a line—a “blood line,” one might say—and then permit plaintiffs to draw blood money.

421. *Hyde v. City of Columbia*, 637 S.W.2d 251, 271 (Mo. App. 1982), *cert. denied*, 459 U.S. 1226 (1983). For discussion of *Hyde*, see *supra* notes 104-112 and accompanying text. This doctrine would surely apply in newsgathering situations, such as in Waco, as well as applying to a journalist's finished product. If anything, this doctrine should apply with even more force to alleged newsgathering wrongs because newsgathering does not receive the same degree of First Amendment protection as speech itself. See, e.g., *Houchins v. KQED*, 438 U.S. 1 (1978); *Saxbe v. Wash. Post Co.*, 417 U.S. 843 (1974); *Pell v. Procunier*, 417 U.S. 817 (1974); *Branzburg v. Hayes*, 408 U.S. 665 (1972).

